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Employment and Labor Law

Teaching Material

Prepared by:

Mahari Redae

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I. General Introduction

This text is intended to serve as a guide in delivering the course on "Employment law" for LL.B candidates in Ethiopian law schools. With due respect to the individual initiative that might be taken by every instructor of this course as to the manner of delivering the same, the content of the course should predominantly focus on the information spelt out in this guide.

II.Course Objective

Having completed this course, students will be able to attain the following **general objectives:**

-discuss the historical development of employment law in Ethiopia

-identify the forms and contents of contract of employment and their peculiar features

-out line the special categories of employees and the need for their special treatment

-explain the concept of minimum working conditions and their significance

-understand the need for cooperation rather than confrontation between employers and employees

-compare and contrast the labour and civil service employment regimes

-identify the necessary procedures for collective bargaining and agreements

-pin point the modalities for dispute resolution if and when it arises

-resolve employment disputes on the basis of the relevant law

-reflect on the role of employment law in maintaining industrial peace, in affecting investment positively or otherwise and in affecting delivery of qualitative public service

In addition to these, **specific objectives** spelt out hereunder will be some of the learning out comes of this course:

-identify the essential definitional elements of employment relation

-outline the historical development of labour law

-briefly overview the historical development of civil service law in Ethiopia

-define what suspension is and the grounds thereto

-grasp how and why historically disadvantaged groups such as women & persons with disability are being preferentially treated in employment

-spell out the grounds for termination of contract of employment

-enumerate the respective legal consequences for lawful and unlawful terminations

-describe the treatment accorded to the so called special categories of employees and the rationale of such treatment

-identify the items of minimum employment conditions

-outline the collective bargaining process leading towards collective agreement

-understand the legal status of collective agreements

-pin point the organs for employment dispute resolution together with their respective jurisdictions

-resolve employment disputes if and when they arise

-explain the concept of industrial action and the modalities of implementing it

Chapter One: Introduction

This chapter will try to bring to light the introductory remarks for the course in general. As definition is a basis for understanding a certain concept, it will begin by defining what a "contract of employment" is. For this purpose and in order to possess a comparative insight on the issue, different kinds of definitions could be brought to the class discussion. Definitions to be found in dictionary and in the different legal instruments such as the Civil Code, Proc. No.64/75, LP[1].No.377/2003 and the relevant provisions of the FCSP (Proc. No.515/2007) could be considered. Particularly definitional elements such as; rendering of **service**, **for the benefit** and under the **direction** of the employer, in return for **remuneration** must be highlighted**.**

Furthermore, since it is believed that better understanding of a concept will be attained through examining its historical development, historical development of employment law will be briefly discussed. For the purpose of this discussion, development of employment relation under the labour law and the Civil Service will be examined separately as they have their distinct route of development not only in Ethiopia but also internationally.

At this level of the discussion, history of labour movement in the industrial world of the 19th century will be of significant help. Traditionally labour relation was considered as economic relation and was left to private regulation through contract. The role of the government in such relations was intended to be nothing more or less than enforcement of promises of the parties. Nevertheless, the principle of freedom of contract failed to bring about equitable outcome in employment relations due to the bargaining position of the parties. It should also be underlined that freedom of contract between economic unequals(i.e. capital & labour) will have the effect of perpetuating inequality. As an expression of the failure of the arrangement, organized and disorganized social unrest begun to crop up here and there. Thus the situation called for state intervention and

[1] In this material, the word LP denotes for Labour Proclamation while FCSP stands for Federal Civil Service Proclamation.

internationally concerted action. The main areas of state intervention in this respect may be gathered from the preamble of the ILO Constitution which is reproduced hereinbelow.

Whereas universal and lasting peace can be established only if it is based upon social justice;

And whereas conditions of labour exist involving such injustice hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by the regulation of the hours of work including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of equal remuneration for work of equal value, recognition of the principle of freedom of association, the organization of vocational and technical education and other measures;

Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries;

The High Contracting Parties, moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world, and with a view to attaining the objectives set forth in this Preamble, agree to the following Constitution of the International Labour Organization:

The establishment of the ILO in 1919 and the objectives set out in the Constitution of its establishment will help in understanding the historical development. It will also be important to pin point to the students that Ethiopia has been a member of the ILO since 1923.

It is also important to highlight the fact that employment law as a branch of law is of relatively recent origin in Ethiopian legal history. For employment law to exist, a free

labour capable of freely contracting to render service is necessary. Thus employment law is a phenomenon of industrial era where freedom of contract and free movement of persons are being respected. Such freedom has been obtained with the abolishment of slavery and tenancy. Slavery as a status was legally abolished in Ethiopia, in 1942. Land lord- tenant relationship remained effective until mid-seventies of the 20th century in Ethiopia.

For the civil service aspect of the historical development, consulting legal documents such as "***An Order to provide for the creation and functions of the Imperial Ethiopian Central Personnel Agency" (Order No.23 of 1961***) together with the "***Regulations issued pursuant to the Central Personnel Agency and Public service order, 1961***" (***Regulations No.1/62) and Federal Civil Servants' Proclamation No.262/2002*** appears to be very important.

NOTES(Extract from Historical Development of Labour Law in Ethiopia);[2] by Mehari Redae

Labour relations in Ethiopia have been very low and slow in development. The cultural, religious and legal settings have had their respective shares for such an outcome.
Culturally, the Ethiopian society's attitude towards labour and labourers has been very discouraging. The traditional Ethiopian society despised both trade and manual work. All the remaining occupations excluding priesthood were relegated to members of the population who were thought of as a lower class. Metal work, for instance was left to one group of the population with such a low reputation that nobody dared to mingle with segment of the population.[3]

It was by realizing this cultural attitude and its negative impact to labour development that the then emperor (King Menelik) issued a proclamation in 1908 with the following content:

[2] This paper was presented by this writer on a workshop held at Adamma to Labour Inspectors and other stakeholders(Oct. 2007)
[3] Marco Guadagni, Ethiopian Labour Law Handbook,p.1

Let those who insult the worker on account of his labour cease to do so. You, by your insults and insinuations, are about to leave my country without artisans who can even make the plough. Hereafter anyone of you who insults these people is insulting me personally.[4]

This provision might serve as a testimony as to the then prevailing official Imperial position towards labour and labourers was positive. Nevertheless, in a situation where such an attitude is deeply entrenched in society, legal provisions will have little or no impact unless and until they are accompanied by cultural revolution. The latter was the missing item then.

The religious rules as well were unfavourable to industrial activity and industrial development. Although there have been many religions in Ethiopia, the Ethiopian Orthodox Church, which had been a state religion for many years was by far the most influential one in Ethiopian history. Accordingly, orthodox religious holidays which have been strictly observed by the population are non working days and there may be as many as fifteen or more per month.

Legally, though Ethiopia has been a member of the ILO since 1923, slavery had legal protection and was entrenched as a system for long time in Ethiopian history. It is well understood that for labour relations to exist and flourish, there should exist a free labour that is capable and ready to render service in return for wages on the basis of a contractual arrangement. However, in a system where slavery as mode of production is legally recognized, there is no such a free labour that is capable of freely contracting.

It was in 1931 that an attempt to abolish Slavery, through law, was undertaken in Ethiopian history. During this period, emperor Haileselassie issued a proclamation with this purpose in view. The relevant part of the proclamation contained the following: "*All slaves who wished to be free could become free by asserting their freedom before a judge".*

[4] King Menelik- Proclamation of 1908.

It seems fairly obvious that the above cited stipulation cannot claim to have abolished slavery because it did not officially do away with the system. For one thing, it addressed itself only to slaves 'who wished to be free' and not to all slaves. Secondly, even for those who wished to be free, the freedom was not automatic and as of right; it rather required appearance before judge to assert freedom. Accessibility of the judges to slaves may also be an issue at the time.

It was only in 1942 that clear governmental commitment to abolish slavery was manifested. At this period, a proclamation which stipulated the abolishment of the status of slavery and which criminalizes possession, sale and transfer of slaves was issued.[5] It is therefore with the doing away with the legal status of slavery that one can speak of labour development in Ethiopia as a freeperson capable of freely contracting has been an essential precondition.

Within the introductory section, it may be appropriate to discuss the sources of employment law. The phrase "sources of law" may mean different under different contexts. Material and formal sources of laws are the most usual ones. Be that as it may, sources of law in this context should be understood to mean "legal instruments which will have impact in regulating employment relations or in resolving employment disputes if and when they arise." (i.e. formal sources of law). These sources could be categorized into national and international or into public and private instruments. The international ones are mainly Conventions and Recommendations.

International Labour Conventions and Recommendations differ from the point view of their legal character: Conventions are instruments designed to create international obligation for the states which ratify them, while Recommendations are not designed to create obligations but provide guidelines for government action. At this juncture, mention should be made as to "any international agreement ratified by Ethiopia in an

[5] Proc. No.22/1942

integral part of the law of the land". (Art.9 (4) FDRE Constitution). As of 2006, Ethiopia ratified 21 ILO Conventions.[6]

The sources of employment law of national origin may be classified into public and private ones.

The public acts include; the FDRE Constitution, the Labour Proclamation together with its amendments, the Federal Civil Service Proclamation and the Regional Civil Service Proclamations of the respective Regions; Pensions' Proclamation etc. Furthermore, subsidiary instruments such as Regulations of Council of Ministers and Directives of the Ministry of Labour and Social Affairs; Directives of Civil Service Agency and the Regional actors need to be consulted. Due emphasis should be given to the constitutional principles such as the right to association; the right to freedom of movement; the rights of labour; equality and non discrimination and other relevant items of the same document.

Last but by no means least, decisions of the Federal Supreme Court Cassation Bench should be noted as sources of employment as these decisions are binding by virtue of Proclamation No.454/2005.

In this connection, it would be important to note that Labour law is within federal jurisdiction[7] while Civil Service law is within the concurrent jurisdiction in the sense that the federal civil service is within the federal competence while the regional civil service is left to the respective Regions.

The private acts are instruments of private nature but binding as though they are law (Art.1731 (1) Civil Code). Thus, strictly speaking they are not law; all the same they are

[6] Some of them are: Forced Labour Convention, 1930(No.29) in 2003; Freedom of Association and Protection of the Right to Organize Convention,1948(No.87) in 1963; Employment Service Convention,1948(No.88) in 1963; right to Organize and Collective Bargaining Convention,1949(No.98) in 1963; Abolition of Forced Labour Convention,1957(No.105) in 1999; Minimum Age Convention,1973(No.138) in 1999; Occupational Safety and Health Convention,1981(No.156) in 1991; Termination of Employment Convention,1982(No.158) in 1991; Private Employment Agencies Convention,1997(No.181) in 1991.

[7] Art.55(3) FDRE Constitution.

assimilated to law. These are: Contracts of employment, Collective agreements and Work rules. The first two instruments are bilateral ones while the third one is a unilateral instrument.

Private act as a source of law for the Civil Service does not seem to be applicable. For one thing, the contract of employment between the Civil Servant and his/her employer (i.e. the government office) will be an administrative in nature and public law in branch. Letter of appointment accompanied by job description, rather than a contract of employment, is to be issued to the civil servant by the head or any other authorized official of the government institution.[8] Secondly, as the law now stands, unionization is not yet allowed for employees of the civil service,[9] collective agreement will be an unthinkable instrument as a source of law in this area.

Finally, under this part, the scope of application of employment law will be considered. Within this context, how and why an **employee** is different from an **agent** or an **independent contractor** has to be analyzed. Arts.2512, 2179, 2199 & 2610 of the Civil Code may be of some help towards such comparison. We all may agree that all these three are commitments to render service. It must be admitted, however, that they have significant differences and employment law applies only on employee-employer relationship. Client- Contractor and Principal-Agent relationships are outside of the ambit of employment law. Issues of exclusions should also be considered under this topic.[10]

NOTES(Extracted from " Simplified Guide to the Ethiopian labour law", By Mehari Redae)

> Determining the scope of application of a legal instrument would enable us to apply it in its appropriate context. It will also help us identify the addressees of the instrument together with their rights and corresponding duties. Therefore, in any analysis of a

[8] Arts.18 & 22 of FCSP
[9] Art.42 (1)(c) of the FDRE Constitution promised that a law will be issued for this propose. Nevertheless, such a law is yet to come.
[10] Arts. 3(2) &(3) of LP; Arts.2(1) &(2) of FCSP.

legal instrument, it is appropriate to determine its scope from the outset. With this purpose in view, the analysis proceeds.

1.1. Definition

Employment relation is established through a contract of employment and it shall be deemed formed where a person (the employee) *agrees, directly or indirectly, to perform work for and under the authority of another (the employer) for a definite or indefinite period or piece work in return for wages*. Let us try to examine the elements of this definition.

Agreement

The definitional elements of an employment contract indicate that agreement is the basis for employment relation and this automatically excludes forced labour from the ambit of employment relations. Hence a person cannot be compelled to enter into an employment relation. Thus in this sense it is a voluntary engagement.

Nevertheless, it is important to note that agreement to employment relation may be expressed directly or indirectly. For instance, a person may directly or personally negotiate with his/her employer and conclude a contract of employment thereafter. The other possibility is public/private employment agencies may serve as intermediaries between the employer and the employee with a view to facilitating their relations. Thus the agreement may be expressed personally or indirectly through employment agencies.

Performance of work

The other element under the definition is the agreement from the side of the employer is "to perform work for of the employer". The employee will be required to render personal service. In this sense, the employee is committing him/her/self to render personal service for the benefit of the employer. Unlike a contract of sale where the seller delivers something tangible to the buyer, in the present case, the employee is making his service available (i.e. something intangible) to the benefit of the employer. Through this arrangement the employee is putting his skill and working capacity at the disposal of the

employer. Although the employee may express his/her agreement indirectly, his/her service is to be provided personally. S/he cannot, as of right, delegate another person to render service in his/her behalf.

1.1.3. Under the authority of the employer

The employee will be required to render the said service within the frame work of the instruction of the employer. This in effect means the employer will possess the prerogative to direct, supervise and control the manner and performance of the employee. Consequently, the employer will have the power to determine what work to be done; when to be done; where to be done; how to be done and with whom to be done.

It is important to note, however, that the authority granted to the employer over the employee is not meant and intended to establish a master and servant relationship. On the contrary, it is within the framework of the terms of the contract that the scope of the authority of the employer over the employee will be determined.

Working under the authority of the employer differentiates an employee from an independent contractor. An independent contractor performs work for the benefit of his/her client but in performing such work s/he is not under the strict direction of the client. The client in such cases is interested on the result and not on the manner how the result was achieved. For example, if a client seeks the service of a tailor to make him a three pieces suit, he will not have an interest where and how it is made so long as the agreed date and quality of the product is maintained. But in case of an employer, he is not only interested on the result but also on the manner of arriving at such result. Therefore it is safe to conclude that where the "employer" has no or minimal authority over his "employee" the relationship between them is client-independent contractor relationship not employer-employee.

Length of employment

As regards to duration, a contract of employment could be entered into either for definite period (for six months, for one year etc), or for indefinite period (i.e. for the life of the company), or for a specific assignment (to unload sacks of grain from a truck). As we all

know marriage, in principle, is a life long engagement. This is not the case for employment relation. There is no as such life long contract of employment.

Wage

Last but by no means is least; among the definitional elements is wage. As the employee is committing himself/herself to render personal service for the benefit and under the authority of the employer, the employer will have a corresponding duty to perform. It will be expected and required to pay wage to the employee. Hence employment relation is not a pro bono service. On the contrary, it is a service in return for wages.

The mode of payment for wage could be in cash or in kind though ordinarily payment is effected through cash. As regards to the interval of payment, it could be in daily, weekly, bi-monthly, monthly etc. basis or it could be assessed on piece rate. The manner or the mode of payment will not have any effect on the relationship of the parties.

From the above discussions, we tried to highlight the elements of a contract of employment. If and when these elements are cumulatively satisfied, the status of the parties will be held as employer and employee relationship.

(Extracts from an ILO document on "Employment relationship")[11]

The employment relationship: Overview of challenges and opportunities

1. The employment relationship is a legal notion widely used in countries around the world to refer to the relationship between a person called an "employee" (frequently referred to as a worker") and an "employer" for whom the "employee" performs work under certain condition in return for remuneration. It is through the employment relationship, however defined, that reciprocal rights and obligation created between the employee and the employer. The employment relationship has been, and continuous to be, the main vehicle through which workers gains access to the right and benefit associated with employment in the area of labour law and social security. It is the key point of reference for determining the nature and extent of the employers' rights and obligations towards their workers.

[11] Footnote omitted.

2. The profound changes occurring in the world of work, and particularly in the labour market, have given rise to new forms of relationship which do not always fit within the parameters of the employment relationship. While this has increased flexibility in the labour market, it has also led to a growing number of workers whose employment status is unclear and who are consequently outside the scope of the protection normally associated with an employment relationship. In 2004, the Director-General of the International Labour Office described the challenge as follows:

> *The state has a key role to play in creating an enabling institutional framework to balance the need for flexibility for enterprise and security for the workers in meeting the changing demands of a global economy … At the heart of national policies to meet the social challenges of globalization is a dynamic strategy for managing labour market change.*

3. The legal framework governing the employment relationship is an important component of national policy for managing labour market change taking account of the need for flexibility and security.

4. The question of the employment relationship has, in one form or another, been on the agenda of the International Conference for over a decade. The following is an overview of the evolution of these discussions culminating in general on discussions in 2003. This chapter also summarize the most pertinent issues in the national studies conducted in 1999-2001, which formed the basis of report prepared by the Office for the 2003 general discussion and which are comprehensively analyzed and referenced in that report.

Evolution of the discussion at the ILO on the employment relationship

5. The ILO has taken the employment relationship as the reference point for examining various types of work relationship. In recent years, the Conference has

held discussion on self- employed workers, migrant workers, home workers, private employment agency workers, child workers, workers in cooperative and workers in the informal economy and in the fishing sector. It has also addressed work relationships in the course of discussion on social security and maternity protection.

6. In 1997 and 1998, the Conference examined an item on "contract labour". The original intention of the Conference discussion on "contract labour" was to protect certain categories of unprotected workers through the adoption of a Convention and a Recommendation, but the proposal to adopt a Convention and a Recommendation failed.

However, at the end of the second discussion in 1998, the Conference adopted a resolution in which it invited the Governing Body of the ILO to place the issue on the agenda of a future session of the Conference with a view to the possible adoption of a Convention supplemented by a Recommendation if such adoption was, according to the normal procedures, considered necessary by that Conference. The Governing Body was also invited to instruct the Director-General:

A. To hold meetings of experts to examine at least the following issues arising out of the deliberation of the Committee on Contract Labour:

i. which workers, in the situation that have began to be identified in the Committee, are in need of protection;

ii. appropriate ways in which such workers can be protected, and the possibility of dealing separately with the various situations;

iii. how such workers would be defined, bearing in mind the different legal systems that exist and language differences.

7. It is noteworthy that in the various debates mentioned above, delegates from all regions repeatedly alluded to the employment relationship, in its various forms and with different meaning, as a concept familiar to all.

8. In accordance with the 1998 resolution, a tripartite Meeting of Experts on Workers in situations needing protection was held in Geneva in May 2000. The common statement

adopted by the Meeting noted that the global phenomenon of transformation in the nature of work had resulted in situations in which the legal scope of the employment relationship (which determines whether or not workers entitled to be protected by labour legislation) did not accord with the realities of working relationships. This had resulted in a tendency whereby workers who should be protected by labour and employment law were not receiving that protection in fact or law. The scope of regulation of the employment relationship did not accord with reality, which varied from country to country, and within countries, from sector to sector. It was also evident that while some countries had responded by adjusting the scope of the legal regulation of the employment relationship, this had not occurred in all countries.

9. The common statement also noted that various country studies had greatly increased the pool of available information concerning the employment relationship and the extent to which dependent workers had ceased to be protected by labour and employment legislation. The meeting agreed that all countries should adopt or continue national policy in terms of which they would, at appropriate intervals review and, if appropriate, clarify or adapt the scope of the regulation in line with current employment realities. The review should be conducted in a transparent manner with participation by social partners. The experts further agreed that ILO could play a major role in assisting countries to develop policies to ensure that laws regulating the employment relationship cover workers needing protection.

10. Further to the resolution adopted by the Conference in 1998, the Office undertook a series of national studies. The objective of the national studies was to help identify and describe the principal situations in which workers lacked adequate protection, as well as the problems caused by the absence or inadequacy of protection, and to suggest measures to remedy such situations.

11. The research undertaken confirmed the universal importance of the idea of the employment relationship, on which labour protection systems are largely based, while highlighting the deficiencies affecting the scope, in terms of persons covered, of the

regulations governing this relationship**.** It also confirmed the extent and repercussions of the problems of lack of workers' protection.

12. At the 91st Session of the Conference in June 2003, a general discussion was held on the scope of employment relationship. During the discussion, many delegates emphasized that the concept of the employment relationship is common to all legal systems and traditions. There are rights and entitlements which exist under labour laws, regulations and collective agreements and which are specific to or linked to workers who work within the framework of an employment relationship. One of the consequences associated with changes in the structure of the labour market, the organization of work and the deficient application of the law is the growing phenomenon of workers who in fact employees but find themselves without the protection of an employment relationship. There was a shared concern among governments, employers and workers to ensure that labour laws and regulations are applied to those who are in employment relationships and that the wide variety of arrangements under which work is performed by a worker can be put within an appropriate legal framework.

13. The Conference also recognized that the protection of workers is at the heart of the ILO's mandate. Within the framework of the ILO's Decent Work Agenda, all workers, regardless of employment status, should work in conditions of decency and dignity.

14. The Conference noted that the ILO should envisage the adoption of an international response on this topic. A Recommendation was considered as an appropriate response. The Recommendation should focus on disguised employment relationships and on the need for mechanisms to ensure that persons with an employment relationship have access to the protection they are due at the national level. Such a Recommendation should provide guidance to member states without defining universally the substance of the employment relationship. The Recommendation should be flexible enough to take account of different economic, social, legal and industrial relations traditions and address the gender dimension. Such a Recommendation should not interfere with genuine

commercial and independent contracting arrangements. It should promote collective bargaining and social dialogue as a means of finding solutions to the problem at national level and should take into account recent developments in employment relationships.

The employment relation and the law

15. The *employment relationship* is a legal concept which underpins the operation of the labor market in many countries. This was confirmed particularly in the discussions on "contract labour" at the International Labour Conference in 1997 and 1998, the Conference discussion leading to the adoption of the private employment agencies Convention, 1997(No. 181), the national studies undertaken by the ILO, the Meeting of Experts on Workers in situations Needing Protection, and the 2003 Conference general discussion on the scope of the employment relationship. It is also reflected in a significant number of international labour standards: some ILO Conventions and Recommendations cover all workers without distinction, while others refer specifically to independent workers or self-employed persons, and others apply only to persons in an employment relationship

16. The employment relationship continues to be the predominant framework for work in many countries. Moreover, a study published in 2000 found that in the industrialized countries, in particular, the employment relationship is not just predominant but is proving durable, contrary to persistent reports that major changes in employment relationships have led to less stability and greater numerical flexibility. Another study published in 2001 founded similar results in six transition countries.

17. Of course, the situation with regard to the employment relationship is not the same in every country. Where the formal economy absorbs only a very small part of the population and where high unemployment swells the ranks of the self-employed, the reality tends to be different. Even in these cases,

however, wage earners may represent a significant proportion of the working population in quantitative terms.

18. The widespread emergence of new forms of employment is frequently referred to in the context of changes in the organization of work and flexible work arrangements. However, new forms of employment may be understood in different ways and mean different things, especially with respect to the legal implications, and for this reason an important distinction needs to be made at this point.

19. People may provide their labour either within the employment relationship under the authority of an employer and for remuneration or within a civil/commercial relationship independently and for a fee. Each of these relationships has certain characteristics which vary from one country to another and determine to what extent the performance of work falls within an employment relationship or a civil/commercial relationship.

20. In some countries and in some sectors more than others, employment relationships have become more diversified. They have become more versatile and, alongside traditional full-time employees, employers are increasingly employing workers in other ways which allow them to use their labour as efficiently as possible. Many people accept short-term employment, or agree to work certain days of the week, for want of better opportunities. But in other cases, these options are an appropriate solution, both for the worker and for the enterprise. Recourse to various types of employment is in itself a legitimate response to the challenges faced by enterprises, as well as meeting the needs of some employees for more flexible work arrangements. These various types of work arrangements lie within framework of the employment relationship.

21. At the same time, there are civil or commercial contractual relationships under which the services of self-employed workers may be procured, but on terms and conditions which differ from those within an employment relationship. Frequent recourse to such contractual arrangements has become increasingly widespread in recent years. From a legal standpoint, these arrangements lie outside the framework of the employment relationship.

22. The determination of the existence of an employment relationship should be guided by *the facts*, and not the name or form given to it by parties. That is why the existence of an employment relationship depends on certain objective conditions being met and not on how either or both of the parties describe the relationship. This is known in law as the *principle of the primacy of fact*, which is explicitly enshrined in some national legal systems. This is also frequently applied by judges in the absence of an express rule.

23. Various factors are used in many countries to determine the existence of an employment relationship. While these factors vary, some of the more common factors include the level of subordination to the employer, work for the benefit of another person, and work under instruction. In some cases, the law goes up one step further, and classifies certain workers as employees whose situation could be ambiguous, or provides for a presumption in their case that there is an employment relationship. Conversely, legislation may specify that certain contractual arrangements are not employment relationships.

24. In some legal systems, certain indicators are relied on to identify whether or not the relevant factors are present to determine the existence of an employment relationship. These indicators include the extent of integration in an organization, which controls the conditions of work, the provision of

tools, materials and machinery, the provision of training and whether the remuneration is paid periodically and constitutes a significant proportion of the income of the worker. In common law countries, judges base their rulings on certain tests developed by case law, for example the tests of control, integration in the enterprise, economic reality, who bears the financial risk, and mutuality of obligation. In all systems, the judge must normally decide on the basis of the facts, irrespective of how the parties construe or describe a given contractual relationship.

25. The existence of a legal framework regulating the provision of labour does not, of course, preclude disagreement when it comes to the examination of specific cases to determine whether an employment relationship exists. Indeed, this is a frequent occurrence, given the proliferation and great diversity of situations in which the worker's status is unclear.

The employment relationship and workers' protection

Context of the lack of protection

26. As mentioned above, the Meeting of Experts in May 2000 highlighted the lack of protection of workers in certain situations in which the legal scope of the employment relationship did not accord with the realities of working relationships. The context in which this lack of protection has arisen varies considerably from one region to another and from one country to another, but in all cases it is linked to significant changes in the structure of employment. Some of these changes are associated with globalization, technological change and transformation in the organization and functioning of enterprises, often combined with restructuring in a highly competitive environment. In the words of the World Commission on the Social Dimension of Globalization, "globalization has set in motion a process of far-reaching change that is affecting everyone." The impact of these changes is very uneven in terms of the degree to which they benefit countries, industries and enterprises.

27. Changes in workers' status and mass redundancies, especially in developing countries or those in transition, are frequently related to major financial crises, external debt, structural adjustment programmes and privatization. These realities have been reflected in a drastic reduction in countries' financial capacity and deterioration in conditions of employment and work. In this context, the growth of the informal economy and undeclared employment has been especially significant.

28. Associated with this development, changes in the structure of the workforce have been accentuated by migration from one country to another or from one sector of the economy to another. Other factors include a strong shift to services, greater participation of women, higher skill of levels of young people in certain countries and deskilling of workers in others. Changing lifestyles, education levels and expectations also lead to workers demanding more flexibility. These changes inevitably influence workers' attitudes and the way in which they cope with finding and keeping a job.

29. Many enterprises, for their part, have organized their activities so as to utilize labour in increasingly diversified and selective ways, including various kinds of contracts, the decentralization of activities to subcontractors or self-employed workers, or the use of temporary employment agencies. These arrangements are encouraged by rapid developments in technology and new management systems in response to the growing demands of competition. This kind of flexibility has frequently been preceded or accompanied by legislative and institutional reforms to enhance the supply and demand for labour or to promote self-employment with the aim of stimulating job creation.

Repercussions of the lack of protection

30. Above all, of course, the lack of labour protection has adverse consequences for workers and their families. At the same time, however, the absence of workers' rights or guarantees can be counterproductive to the interests of the enterprise itself and have a negative impact on society generally. Moreover, there is some evidence indicating that these changes affect women more than men. Workers in these situations not only lose their rights under labour law, but also have difficulty securing the protection of the competent inspection services or seeking redress through the labour courts. In many countries, they are completely excluded from or on the fringe of social security protection and receive less favorable benefits than those workers recognized as employees.

31. The lack of labour protection of workers can also affect employers, to the extent that it undermines productivity and distorts competition between enterprises, both at national and sectoral or international level, often to the detriment of those who comply with the law. The lack of legal certainty can also result in judicial decisions reclassifying "self-employed" workers as employees, with considerable unforeseen economic consequences for enterprises. At the same time, the reality of work without any prospect of stability or promotion can ultimately make workers lose their commitment to the enterprise and contribute to an increasing and costly labor turnover.

32. Another dimension of the lack of labour protection is the neglect of training, including training for work in environments where there are inherent risks. Enterprises can be reluctant to invest in training workers who will probably not be with them for long. The user enterprise is unlikely to train the workers supplied by another firm, except for very specific purposes. Untrained workers are more vulnerable to accidents in the workplace and can hamper the competitiveness of the enterprise. In addition, in some sectors which have large numbers of unprotected workers, the negative

image can create serious problems of recruitment and retention of workers. The construction industry is one example of such a sector.

33. The lack of labour protection can also impact on the health and safety of third parties and society in general. Some accidents, such as those caused by heavy vehicles or major accidents in industrial plants, have caused damage to the environment, as well as injuries and fatalities to third parties. The link between accident risks and the lack of workers' protection has also been observed in situations where there is extensive use of subcontracting. The issue is not subcontracting itself but its improper use, which can create or aggravate risks.

Uncertainty with regard to the law

34. Disputes concerning the legal nature of a relationship for the provision of labour are increasingly frequent. The employment relationship may be objectively ambiguous or disguised. Both situations create uncertainty as to the scope of the law and can nullify its protection.

35. The problems faced by workers involved in **"triangular" employment relationships** pose different legal questions. These are workers employed by an enterprise (the "provider") who perform work for a third party (the "user") to whom their employer provides labour or services. For these employments status is not in doubt, but they frequently face difficulties in establishing who their employer is, what their rights are and who is responsible for them.

36. Changes in the legal status of workers, whether real or apparent, seem to be a sign of the times and are commonly observed not only in traditional sectors such as transport (truck drivers, taxi drivers), construction and clothing, but in new areas as well, such as sales stuff in department stores, or

certain jobs in wholesale distribution or in private security agencies, although there are considerable differences from one country to another and from region to region.

Objectively ambiguous employment relationships

37. In a standard employment relationship, the worker's status is not normally open to doubt. In some cases, however, a worker may have a wide margin of autonomy and this factor alone may give rise to doubt as to his or her employment status. There are situations where the main factors that characterize the employment relationship are not apparent. It is not a case of a deliberate attempt to disguise it, but rather one of genuine doubt as to the existence of an employment relationship. This may occur as a result of the specific or complex form of the relationship between workers and the persons to whom they provide their labour, or the evolution of that relationship over time. Such situations may occur with persons who are normally self-employed, such as electricians, plumbers and computer programmers, and who gradually enter to a permanent arrangement with a single client.

38. In other cases, especially in work environments affected by major changes, it is possible and sometimes necessary to resort to a range of flexible and dynamic employment arrangements which can be difficult to fit into the traditional framework of the employment relationship. A person may be recruited and work at a distance without fixed hours or days of work, with special payment arrangements and full autonomy as to how to organize the work. Some workers may never even have set foot in the enterprise if, for example, they have been recruited and work via the Internet and are paid through a bank. However, perhaps because they use equipment supplied by the enterprise, follow its instructions and are subject to subtle but firm control, it may be that the enterprise quite naturally considers them as

employees. The emergence of "e-lancers" (electronically connected freelancers) is another phenomenon which is challenging the traditional employment framework.

39. Midway between the employment relationship and self-employment, there are "economically dependent workers" who are formally self-employed but depend on one or a few "clients" for their income. They are not easy to describe, let alone quantify, because of the heterogeneous nature of the situations involved and the lack of a definition or statistical tool.

40. In cases where the contract is clearly intended to procure the services of a self-employed worker, it is in employers' interest to make sure that they have not misclassified the worker, as they can be held financially liable if the authorities find that the worker is in fact an employee.

Disguised employment relationships

41. A disguised employment relationship is one which is lent an appearance that is different from the underlying reality, with the intention of nullifying or attenuating the protection afforded by the law or evading tax and social obligations. It is thus an attempt to conceal or distort the employment relationship, either by cloaking it in another legal guise or by giving it another form. Disguised employment relationships may also involve masking the identity of the employer, when the person designated as an employer is an intermediary, with the intention of releasing the real employer from any involvement in the employment relationship and above all from any responsibility to the workers.

42. The most radical way to disguise the employment relationship consists of giving it the appearance of a relationship of a different legal nature, whether civil, commercial, cooperative, family-related or other. Some of the contractual arrangements most frequently used to disguise the employment

relationship include a wide variety of civil and commercial contracts which give it the semblance of self-employment.

43. The second way to disguise the employment relationship is through the form in which it is established. While the existence of an employment relationship is not in question, the nature of the employment relationship is intentionally misrepresented so as to deny certain workers' rights and benefits. For the purposes of this report, such contract manipulation amounts to another type of disguised employment relationship, resulting in a lack of protection for the workers concerned. This is the case, for example, of contracts concluded for a fixed term, or for a specific task, but which are then repeatedly renewed, with or without a break. The most visible effect of this type of contract manipulation is that the worker doesn't acquire the rights and obtain the benefits provided to employees by labour legislation or collective bargaining.

44. The trend towards replacing the employment contract with other types of contract in order to evade the protection provided the Termination of Employment Convention, 1982 (No. 158), was noted by the ILO Committee of Experts on the application of conventions and Recommendations in 1995.

"Triangular" employment relationships

45. As already mentioned, "triangular" employment relationships occur when employees of a person (the "provider") work for another person (the "user"). A wide variety of contracts can be used to formalize an agreement for the provision of work. Such contracts can have beneficial effects for the provider's employees in terms of employment opportunities, experience and professional challenges. From a legal standpoint, however, such contracts may present a technical difficulty as the employees concerned may find themselves interacting with two (or more) interlocutors, each of whom assumes certain functions of a traditional employer.

46. There are also, of course, cases of objectively ambiguous or disguised "triangle" employment relationships. A "triangular" employment relationship normally presupposes a civil or commercial contract between a user and a provider. It is possible, however, that no such contract exists and that the provider is not a proper enterprise, but an intermediary of the supposed user, intended to conceal the user's identity as the real employer.

47. "Triangular" employment relationships have always existed, but this phenomenon is now on the increase. The national studies identified a growing tendency among enterprises in many countries to operate through other enterprises or with their collaboration. In these situations, workers provided by different enterprises can be found working on the user's own premises or outside, even in a different country "Triangular" employment relationships can take various forms. The best known is the use of contractors and private employment agencies.

48. In an employment relationship, there is usually no doubt about the identity of the employer where workers deal with only one person. This person is the one who hires the worker or who performs the normal functions of an employer: assigning tasks, providing the means to perform them, giving instructions and supervising their performance, paying wages, assuming risks, making profits and terminating the employment relationship. The situation may be different, however, in a "Triangular" employment relationship, when these roles are assumed separately or jointly by more than one person and anyone or a number of them may be perceived as the employer, in which case the employee may reasonably wonder: who is in fact my employer?

49. In particular, workers may not know, for example, from whom exactly to claim payment of remuneration or compensation for an accident at work, and whether they can file a claim against the user when the direct employer disappears or becomes insolvent. Doubt as to the identity of the employer, or the involvement of the user in the employment relationship, leads to the following key questions in the case of "triangular" relationships: what are the worker's rights – are they the rights agreed by the employee with his or her employer (the provider), or those of the employees employed by the user, or a combination of the two?

50. Workers may wonder who is responsible for their rights. The logical answer, which is normally consistent with the law, is that employers are primarily responsible for the rights of their employees, whether they are a contractor, an employment agency, a cooperative or any other employing enterprise or entity. However, the role of the user can be crucial with respect to ensuring respect to these rights (such as limits on working hours, rest breaks, paid leave, etc.). There are laws which in some circumstances also assign a measure of responsibility to the user, as the person who benefits directly from the labour of the worker and who often appears to be an employer or someone similar to an employer. Depending on the circumstances and national law, the employer (or provider) and the user may bear joint and several liability, so that the worker can claim against both or either of them without distinction. In other circumstances, the user bears subsidiary liability, in the sense that a claim may only brought against the user in the event of non-compliance by the provider. A number of ILO instruments also address this subject.

51. The determination of the identity of the employer and other possible parties to "triangular" employment relationships, of the workers' rights and of the persons responsible for ensuring those rights raises legal issues which are not easy to resolve. However, the major challenge lies in ensuring that

employees in such a relationship enjoy the same level of protection traditionally provided by the law for employees in a bilateral employment relationship, without impeding legitimate private and public business initiatives.

52. In summary, in cases of "triangular" employment relationships, employees are frequently faced with multiple interlocutors. In such circumstances, it is essential that such employees know who the employer is, what their rights are, and who is responsible for them. It is equally important to determine the position of the user with respect to the employees of the provider enterprise. A balanced and constructive approach to the question should take into account the legal difficulties involved, and the legitimate interests concerned.

Closing the gap

53. In response to the growing divergence between the law and the reality of the employment relationship, measures need to be taken to close this gap. The objective should be to update and clarify the law governing the employment relationship so as to facilitate recognition of the existence of an employment relationship, and deter attempts to disguise it. Given the proliferation of objectively ambiguous and disguised situations and the growth of "triangular" relationships, member states, with the involvement of the social partners, could examine their legislation so as to identify any deficits in the light of their own specific problems and comparative law. This would enable them to determine the nature and extent of the measures needed. The outcome of this exercise should be to enable the laws on the employment relationship to be regularly updated as part of an ongoing and dynamic process.

Clarifying the scope of the law

54. The first part of the strategy would be aimed at clarifying, supplementing and stating as precisely as possible the scope of the law. At this stage, it could

be useful to examine the most common forms of disguised employment relationships and cases in which it is most difficult to determine whether there is an employment relationship or a civil or commercial relationship. The task would consist of remedying the technical deficiencies in the legislation in order to address objectively ambiguous cases and to tackle the phenomenon of disguised employment relationships. In relation to "triangular" relationships, the objective would be to clarify the law so that the employees know who the employer is, what their rights are and who is responsible for them.

55. Comparative law contains a wealth of notions and legal constructs as to what is meant by an employment relationship and the factors and indicators used for recognizing it. In addition, there are mechanisms and institutions to enforce the law and guarantee workers' rights. These generally enable the regulation of the employment relationship to operate smoothly so that the status of the worker can usually be determined. However, the law does not cover all of these aspects equally or with the same degree of precision and effectiveness in all countries.

Adjusting the limits of the legislation

57. Clarification alone, however, may not be enough to regulate cases which do not fall within the current scope of the legislation. This calls for certain adjustments to the limits of the legislation. This can be done in a number of ways. First, in the case of objectively ambiguous relationships, where some of the features of the employment relationship are blurred or absent, the law needs to be adjusted so as to enable a clearer identification of the employment relationship, where it exists. Second, the legislation can be extended to include categories of employees or sectors that are explicitly or implicitly excluded from the scope of the law. These exclusions frequently apply to employees in small and micro-enterprises and export processing zones (EPZs). Furthermore, in some countries, labour laws do not have general coverage, but apply only to certain employees. In such

circumstances, progressive steps could be taken towards a more general application of the legislation concerned. Third, the scope of the law may be adequate, but it may be narrowly interpreted by the courts. The development of factors and indicators for determining the existence of an employment relationship can promote consistency and predictability in courts decisions.

Balancing equality and adaptability

58. The lack of labour protection raises questions of equity, on the one hand, and flexibility or adaptability, on the other. A balance between the two must be sought through social dialogue aimed at building a broad consensus. Employers are constantly faced with the challenge of survival in a competitive global environment and legitimately seek viable solution among the range of options offered by different forms of employment. However, it is difficult for enterprises to improve their productivity with a poorly trained, demotivated and rapidly changing workforce.

59. Balancing equity and adaptability is at the very heart of the ILO's Decent Work Agenda, which offers a framework for reconciling the different interests and reaching a consensus through social dialogue. Countries have found different institutional and policy responses to reconcile these diverging interests. For instance, a number of European countries have moved away from a situation where flexibility creates insecurity to one in which security promotes flexibility.

Ensuring compliance

60. The problem of objectively ambiguous, disguised or "triangular" employment relationships cannot, however, be entirely attributed to lack of clarity and the problems relating to the scope of the law. Another

contributing factor, which is particularly serious in some countries, is failure to comply with the law, accompanied by poor enforcement.

61. The problem of non-compliance is particularly serious in some developing countries, although it also occurs in industrialized countries. The studies carried out confirm a commonly expressed view that traditional mechanisms to enforce labour laws are not used as they should be. In particular, mechanisms and procedures for determining the existence of an employment relationship and establishing the identity of the persons involved are generally insufficient to prevent infringements of labour law or to safeguard workers' right. Problems of compliance and enforcement are particularly acute in the informal economy.

62. Enforcement of labour law by the administrative and judicial authorities is affected by financial constraints in most countries. Moreover, the limited powers of these authorities and their enforcement mechanisms, such as they are, often mean that they are unable to discharge their obligations.

63. Labour inspectorates frequently face considerable difficulties in carrying out their tasks. In some countries, the probability that an inspector will visit a particular enterprise, detect shortcomings, impose corrective measures and enforce them is very low or nonexistent. Particular difficulties arise where the premises are extensive or located in remote places and, for different reasons, in small and micro-enterprises. The situation is even more uncertain as regards the possibility of action by labour inspectors concerning workers in objectively ambiguous or disguised employment relationships, even in countries where inspectors are empowered to identify such cases and remedy them.

64. In principle, all workers have access to the courts. In practice, however there are countries where restrictions on access to the courts are considerable and few workers can afford to enter into long, costly and inevitably uncertain judicial proceedings. Rarer still, of course, are those workers who, while still working, resort to the courts for a ruling on their employment status.

65. Improving protection for workers within the employment relationship requires that the mechanisms and institutions established to enforce compliance with labour law function effectively. Each country, depending on the deficits in its legal system and in the organization and functioning of its labour institutions, should consider streamlining the task of labour inspection and making it more efficient, with advisory and enforcement powers appropriate to present-day circumstances.

Problems for discussion

Why should labour law be under federal jurisdiction?** ***In the US where a federal structure is in place, labour matters are within concurrent jurisdiction in the sense that where the employer is involved in inter-state or international commerce or where its products or services cross state borders, it will fall under federal competence and in all other cases it will be a state matter. **Would the US approach be much more convincing than ours? Why? Why not?**

**** Is the relationship between a church and a priest within the ambit of employment law? Does the relationship satisfy the definitional elements? If yes how? If no, which item(s) is missing?***

**** Would regulating church-priest relationship within the framework of employment relation be interference in religious affairs thereby unconstitutional? (Refer. FDRE Constitution Art.11 & Federal Supreme Court Cassation Bench decision File. No.18419)***

Chapter- II- Individual Employment Relation

2.1 Formation

Under the preceding chapter, tried to show some introductory remarks as to the historical development of employment law, its sources of law, its definitional elements and its scope of application. It has also highlighted the different challenges faced in determining and implementing employment relations globally.

With this information at the back of our minds, let us proceed to examine the individual employment relation. Individual employment relation, means is, a contractual relation between an employee and his/her employer in their individual capacity.

Discussing who an employee is and who an employer is will be important mental exercises to begin discussion at this level. Art.2 (3) conjointly read with Art.4 (1) of the LP will assist us in understanding who an employee is for purposes of the LP. When it comes to the Civil Service, Art.2 (1) of the FCSP has already defined who a Civil Servant is.

As regards to employer for purposes of labour law and civil service, Art.2 (1) & (2) of LP and Art.2 (3) of FCSP will be helpful for the analysis. It must be underlined that employer under the labour law is any natural or legal person which is engaged in any lawful activity, be it profit making or otherwise; whereas employer under the civil service is a status assigned to an exclusively federal legal organ established by a legal instrument and fully or partially financed by government budget.

Employment relations under the labour law and under the Civil Service have their own peculiar features. In the labour law setting, the legal instrument is limiting itself towards stipulating minimum conditions of labour providing sufficient room for flexibility for further bargain by the parties either through contract or collective bargaining. Under the Civil Service, however, conditions of work are rigorously regulated by law and there is little or no room for negotiation. In this sense most (if not all) the work conditions spelt

out in the Civil Service instruments are not only minimum but also the maximum. Such basic distinctions should be emphatically stated in class discussions at this stage.

Specific employment relations which are outside of the ambit of both the labour and civil service employment regime should be mentioned in order to show that **Ethiopian employment regime is not purely dual.** It rather has a "third regime" at the margin. For example employees such as the police and armed forces, domestic workers, management staff and others are within the third regime.

As regards to forms of contract, the labour law regime in principle does not require any special form for contractual validity. It is under exceptional cases that it requires written form[12]. The Civil service regime on its part requires written instrument in all cases. As a contract of employment is a contract with public administration, the civil code requires a special form for the purpose (Art.1724 C.C.)[13].

Once a contract of employment is duly formed, the parties are expected to spell out their respective rights and obligations under the contract exhaustively. Nevertheless, the laws have also incorporated implied terms to the parties through legislation. Articles 12-14 of LP and Articles 61-65 of the FCSP may be helpful in elucidating this issue. The duty to provide work and the agreed wage to the employee is among the most important obligations of the employer. On the other hand, the employee is duty bound to provide personal and faithful service with due diligence.

The principle of non-discrimination among employees on the basis different protected grounds has been strictly regulated both under the labour proclamation and the civil

[12] Art. 5 LP
[13] Actually when we closely look at the Civil Service proclamation, there does not seem a proper contract of employment between the civil servant and the government office. Instead of a contract of employment, a letter of appointment together with a job description will be issued to the newly recruited civil servant.(Art.18(1) of the Proclamation)

service one.[14] This principle has also been enshrined under the two important ILO Conventions to which Ethiopia is a party and the FDRE constitution.[15]

Problem for discussion

**** Among the obligation of the employee, we find "to observe work rules issued by the employer" (Art.13 (7) LP) what does this imply? What if the employer establishes search at the gate of the enterprise while checking in and checking out for the employees, can an employee invoke the right to privacy/presumption of innocence to object such search in her body and belongings? What about dress code? Assume that the dress code of the enterprise is in conflict with the religious dress code of the employee, will the employee be justified if she invokes freedom of religion in view of disregard the enterprise's dress code?***

As the main element in a contract of employment has been the consent of the parties to the contract, they are at liberty to modify the terms of their contract and to suspend it if and when the need arises so long as their consent have been externally and clearly manifested as required by the law.[16]

While the parties are contractually engaged, it may be possible that the rights and obligations of the parties may be suspended for different reasons. Relatively speaking the Labour Proclamation has had detailed provisions pertaining to suspension as opposed to the Federal Civil Service Proclamation.

(The following is an adaptation from "the Simplified Guide of the Ethiopian Labour law" cited above relevant to the discussion at ha

[14] Art. 14(1) (b) & (f) LP & Art.13 (1) FSCP.
[15] Conventions No.100 (Equal Remuneration Convention of 1951) & Convention No. 111(Discrimination (Employment & Occupation) Convention of 1958) both ratified by Ethiopia in 1999 & 1966 respectively. See also Art.25 of the FDRE constitution for principles of equality.
[16] Art.15 LP

2.2. Suspension

Suspension is a situation where the employee will not be required to provide service to the employer and the employer will not be obligated to pay wages and other benefits to the employee. Nonetheless, their contractual engagement remains intact. Therefore, suspension is a grey area in the sense that it has attributes of termination on the one hand and of employment relation on the other hand.

A contract of employment may be suspended for a variety of reasons. Some of the grounds are:

-Voluntary arrangement of the parties;

-Societal interest;

-Due to reasons beyond the control of the employer;

-Due to disciplinary reasons.

2.2.1. Voluntary arrangement

The employer and the employee may agree to suspend their contractual relation for sometime. For example, the employee may get an offer for a better pay for six months of employment. In such case she may request her employer to grant her leave without pay for six months. If the employer accepted the request, this is a typical case of suspension. Within the agreed six months, the employer will not pay the wages and other benefits to the employee and the employee will not be required to render service for her employer. At the expiry of the six months period, however, the parties will be reinstated to their previous employment relation.[17]

2.2. 2 Suspension for the benefit of society

An employee may be elected to hold office at higher level trade union structure which may demand full time engagement. The other possibility is he may hold office at kebele or woreda level or he may be elected as parliamentarian. It is also possible that the employee may be required to discharge national service (be it military service or otherwise)

[17] Art. 18(1) LP & Art.45 (1) FCSP.

In such cases what will be the fate of his contract of employment? Should it be terminated? Should he be still considered as an employee and collect wage from the employer even if he is not rendering service to him? It seems unfair to terminate the contract of employment of this individual because he is rendering service which is important to society at large and should not be sanctioned for that. Individuals should be encouraged to serve society. This can be achieved by ensuring employment security to such individuals.

Should the employer then be required to pay him wages while the employee is not rendering service to him? This is again unfair to the employer because as the service is being rendered to society at large it should be society which should incur such costs and not the employer individually.

To strike the balance between these two concerns, the Labour Proclamation has come up with this solution. This solution is suspending the contract of employment until such time the employee accomplishes his societal service after which he will regain his employment.[18]

2.2.3 Suspension due to reasons beyond the control of the employer

At times situations which will have an impact of temporary cassation of activities of the undertaking may occur. Most of these situations are economic reasons though there may also other reasons. For example, the Wonji sugar factory may be compelled to temporary suspend its operations fully or partially due to the over flow of the Awash River. This may be one incident where suspension may result from non-economic reasons. Financial problem may also be a ground for temporary cassation of operations.

Suspension under these grounds is not within the sole discretion of the employer. It is subject to revision by the Ministry of Labour and Social Affairs or Regional Labour and Social Bureaus. In order for the Ministry to determine whether the stated reason is

[18] Art.18(2) LP & Art.45(2) FCSP.

adequate to suspend operation or not, the employer should notify the Ministry within three days of the occurrence of the alleged ground of suspension.

The Ministry is expected to determine whether or not there is sufficient ground for suspension or not within three working days after the receipt of the report. If the Ministry determines there is sufficient ground for suspension, it will approve it and fix the duration for it. But the duration shall not exceed ninety days.

If the Ministry determines that there is no adequate reason to withhold operation, it will order the resumption of the activities and payment of wage for the days on which the employees were suspended. The employer may appeal within five working days against this decision to the appellate court of the Region where it runs its business.

If the employer fails to inform the Ministry of the occurrence of a ground for suspension, it will not have valid ground to suspend its operation. Furthermore it may be liable to fine for failure to notify.[19]

2.2.4. Disciplinary Suspension

One of the prerogatives of an employer is to take disciplinary action against an employee. The employee on its part is required to render faithful service to the employer. Failure to observe such faithfulness may subject the employee to disciplinary action. But prior to taking action, the employer is expected to undertake the necessary investigation into alleged misconduct of the employee. Until such time the investigation is completed, it may be appropriate to suspend the employee so that investigation could go smoothly.

With this purpose in view, the Labour Proclamation delegated collective agreements to deal with the matter. Nevertheless, disciplinary suspension is not to exceed one month in duration within which time the employer should complete its investigation and arrive at a decision. Thus, as the Labour Proclamation now stands, disciplinary suspension is not within the unilateral power of the employer, it is rather to be determined by the employer

[19] Ibid, Art.184(1)(c)

and the trade union (i.e. collective agreement). Besides, its length is not even left to collective agreement; it is rather fixed by law and cannot exceed one month.[20]

Note & Exercises.

**** Under the Civil Service law, disciplinary suspension is within the sole prerogative of the employer. Its length could also be as long as two months.(compare Art.27(4) Labour Proclamation and Art.70 of Civil Service Proclamation) Why do you think the legislature decided to adopt double standard in this regard? Is it justified? Why? Why not?***

**** More often than not, misbehaviors which may subject an employee to disciplinary investigation could at the same time be reasons for filing a criminal charge against the same. Let us assume that parallel actions (i.e disciplinary & criminal proceedings) were being commenced against the employee. Let us further assume that the disciplinary proceedings resulted in positive determination that the employee indeed committed that alleged misconduct and summarily dismissed due to it. Let us also assume that the criminal proceedings failed to convict the accused for lack of adequate evidence and hence the accused has been acquitted. What effect will the acquittal have, if any, on the disciplinary action? I mean, should the employee be reinstated now that his/her innocence has been judicially determined? Why/ why not?***

2.2.5. Consequences of expiry of period of suspension

Normally as soon as the duration for suspension expires, the employee will be reinstated to his/her previous employment. But there may also be circumstances where suspension may be transformed into termination. For instance, in case of disciplinary suspension (e.g. if the outcome of the investigation shows a serious misconduct attributed to the employee), the contract of the suspended employee may be terminated. In case of suspension for reasons beyond the control of the employer, particularly suspension due to economic reasons,(e.g. if the undertaking cannot resume operation within ninety days) suspension will be transformed into termination.

[20] Art.27(4) LP & Art.70 FCSP.

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2.3. Termination

Termination of a contract of employment and its effects are important issues to be discussed in this course. Both the LP and the FCSP spelt out grounds of termination in their respective regimes of employment.

Under the LP grounds of termination could be categorized into the following:

-termination by law (Art.24)

-termination by the agreement of the parties (Art.25)

-termination at the initiation of the employer-(dismissal)-(Arts.27, 28, 29 & 30)

- With out notice or summary dismissal (Art.27)
- With notice or ordinary dismissal (Art.28)
-Group termination or lay off (Arts.29&30)

-termination at the initiation of the employee-(resignation)-(Arts.31, 32)

-Resignation with notice/ordinary resignation (Art.31)
-Resignation without notice (constructive dismissal) (Art.32)

Under the FCSP, the following are the lawful grounds for termination:

-resignation (Art.78)

-termination due to illness (Art.79)

-termination on grounds of inefficiency (Art.80)

-termination due to force majeure (Art.81)

-nullification of employment (Art.82)

-retrenchment (Art.83)

-termination on disciplinary grounds (Art.84)

-retirement (Art.85)

-termination on the ground of death (Art.86)

2.4. Effects of Lawful Termination

Once a contract of employment is terminated in accordance with the stipulation of the law and the parties are separated for good, there will be some consequences which will follow the termination. Most of the consequences are attached with the ground for termination while few others are available to all terminations. These are the following:

2.4.1. Certificate of Service

This is a document to be issued by the employer which testifies how long the employee had been employed at the employer; the position he/she held; and the wage he/she was earning while employed. (Art.12 (7) LP & Art.87 FCSP) Actually this document may be requested and issued while the employee has been still employed (i.e. even without termination), in practice however, employees request for it after termination. It would be helpful for the employees in their effort to look for other employment.

This document is available free of charge to all terminations except for termination due to death of the employee as it will not have a purpose to be served in cases where the termination is the result of death.

As regards to the content of this certificate, reason for termination is not an essential element to be spelt out in such document. At times reason of termination may be unhelpful to the employee's future effort for employment. For example, if the contract of employment was terminated due to the serious misdeed of the employee, mentioning such ground of termination in the certificate may negatively affect the employability of the individual. This seems the main reason why mentioning the reason for termination is not to be mentioned. Nevertheless, if the employee is willing and ready to write favourable terms to the employee, the law does not seem to have any objection.

In this connection, Recommendation No.119 of the ILO stated that "nothing unfavourable to the worker should be inserted in such certificate" Art.8 (2). (See also Civil Code of 1960 Art.2588 (2)) Under the Civil Service, Proclamation No. 262/2002 required the inclusion of reason for termination in the certificate. However, this has been deleted with the adoption of Proclamation No. 515/2007.(Compare. Art. 82 of Proc.

No.262/2002 with Art.87 of Proc. No.515/2007). Hence even an employee whose contract of employment was terminated due to theft or breach of trust is entitled to "clean" Certificate of Service.

Problem

How and to what extent is the law fair in this respect? Why should reason of termination be withheld?

2.4.2 Payment instead of unutilized annual leave

In principle it is prohibited to convert annual leave into cash.[21] However, if the contract of employment is terminated prior to the utilization of the annual leave, the employee is entitled to his pay for the leave he has not taken.[22] As annual leave cannot be postponed for more than two years,[23] the payment for this cannot be in excess of two years annual leave converted into cash.

Problem

What if the contract of employment was terminated by death? Are heirs of the deceased employee entitled to claim conversion of annual leave into cash? Why? **Why** ***not?***

2.4.3 Severance payment

Unlike Certificate of Service and payment instead of annual leave which are available to almost all grounds of termination, severance payment is available to employees whose contract of employment is terminated on specified grounds.

The most important limitation is, an employee who is entitled to pension payment immediately after termination is denied of severance payment.[24] Whether an employee is entitled to pension scheme as soon as s/he is terminated or not will be determined on the basis of the Pension Proclamation.

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[21] Art. 36(3) FCSP & Art. 76(2) LP
[22] Ibid. Art. 36(3)FCSP and Art.77(5)LP respectively
[23] Ibid. Art.39(1) & Art.79(5) respectively
[24] Labour Proclamation No.494/2006 Art.2 (g) & Art. 88(1) Federal Civil Service Proclamation

If the enterprise has already established a provident fund on the basis of work rule or collective agreement which is more beneficial to the employee than the severance payment available to him/her, the provident fund will be payable and severance payment will be denied in such cases.[25] For grounds of termination which entitle severance payment, readers are advised to consult Art.39 (1) of LP No.377/2003; Art.2 (2) of Proc. No.494/2006 and Arts. 83 & 88 of FCSP Proc. No.515/2007.

Once the employee is entitled to severance payment, the amount of such payment will be determined on the amount of wage the individual was earning prior to termination and his/her length of service. It is interesting to note that the FCSP and the LP have slight difference with respect to determining the amount of the severance payment.(Refer Arts. 88(1)(a) and Art 40(1) respectively)

Problem

Why does the legislature decide to adopt such a double standard? Even if such double standard is justified, why should it be limited then to the first year of service only?

[25] It should be admitted at this point that some lawyers tend to hold that provident fund and severance payment are both available to an employee whose contract is terminated. However, in my view, with due respect to such an opinion, I disagree with it. First of all, it should be noted that severance payment is one of the minimum labour conditions. It means that if a contract of employment, work rule or collective agreement comes up with more favourable terms; its applicability will be withheld. Secondly, the recently adopted (i.e. Proc. No.494/2006) particularly Art.2 (2) (g) may be of some help in determining the intention of the legislature that provident fund and severance payment are mutually exclusive. Thirdly, Termination of Employment Convention No.158, to which Ethiopia is a party, under Art.12(1) (a) has been stipulated the following: "a worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to a severance allowance or other separation benefits, the amount of which shall be based inter alia on length of service and the level of wages, and **paid directly by the employer or by a fund constituted by employers' contributions**(emphasis mine). Admittedly, the Convention seems to envisage the payment of the combination of both **an allowance** and **separation benefit** (Art.12 (1)(c); nevertheless, it must be expressly stated by national law or by express agreement of the parties and in the absence of express stipulation the fair assumption will be only one of them(i.e. the more beneficial of the two) will be accorded to the employee. Fourthly, even from logic point view, if the employer is to be compelled to effect both payments to a single termination it will not have an incentive to provide for provident fund through collective agreement or work rule as it could not save it from any legal obligation. Thus such an approach, on the long run, will be to the disadvantage of the employees.

2.4.4 Compensation

Few grounds of termination have also produce entitlements of compensation to employees who have been separated on the basis of that particular ground. These entitlements are applicable only to employees under the labour law regime.

Employees whose contract of employment have been terminated due to "the permanent cessation of operation of the undertaking because of bankruptcy or any other cause" (Art.24 (4) or due to lay off (Art.29) are entitled to compensation. Moreover, employees who resigned on an extra ordinary procedure (Art.32) are also beneficiaries of such compensation.

The amount of compensation in such cases is a liquidated sum of "sixty multiplied by the average daily wage of the employee for the last week of service for the first two grounds of termination and an amount equal to thirty times his/her daily wages of the last week of service for the final ground of termination above. Unlike severance payment which takes length of service into consideration, the amount of compensation in both cases does not take the length of service of the employee into account.

2.4.5 Period of limitation

The time within which the entitlements are to be claimed is also relevant. In principle, the labour proclamation tends to fix short durations after the expiry of which the claim may be barred by limitation.(refer Art.162)

In addition to fixing short of period of limitation, the law obligates the employer to effect all payments due to the employee within seven working days from the time of termination.(refer.Arts.36-38). It is interesting to note that the FCSP does not possess similar stipulations except in cases of disciplinary measures.[26]

[26] Art. 71 FCSP.

2.5 Unlawful termination and its effects

Any termination which fails to observe the substantive or procedural requirements of termination shall be held unlawful.(refer Arts.14(1)(c),23(1) & 42 of Labour Proclamation.

At this point in time, it may be appropriate to examine as to who has the burden of persuasion whether a certain termination is lawful or not. Under the traditional concept of contract law, "*someone who demands the performance of an obligation should prove its existence*."[27] As a contract of employment is a special contract, the general principle of contract law will be applied on it unless and until it possesses its own specific principle on the issue. Based on this general principle, if and when the employee alleges that s/he has been unlawfully terminated and requests for reinstatement or compensation or both, s/he will be required to show to the satisfaction of the impartial that the termination was indeed unlawful. Nevertheless, both the labour proclamation and the ILO convention on termination of employment[28] seem to deviate from this general principle. They seem to adopt the ***reverse burden of proof*** approach.

The labour proclamation has laid down a presumption that any contract of employment is deemed concluded for *indefinite* duration. Hence, in termination cases, this presumption will have an effect of shifting the burden of proof to the employer to show the contract was lawfully terminated by relying on either of the grounds under Art.10 or any of the grounds of termination spelt out in the proclamation. Consistent with this, the Convention on Termination of Employment and the explanatory note for it have the following to say: (Extracts from **General Survey of Committee of Experts** on *Protection against unjustified dismissal PP.77-80*[29]*)*

> 198. As regards the burden of proof Article 9, paragraph 2, provides that "in order for the worker not to have to bear alone the burden of proving that the termination

[27] Civil Code Art.2001(1)
[28] ILO Convention No.158, *Termination of Employment Convention* ratified by Ethiopia in 1991.
[29] The analysis of the Committee of Experts submitted herein below is an interpretation of the provisions of Convention No.158 to which Ethiopia is a party.

was not justified, the methods of implementation referred to in Article 1 of this Convention shall provide for one or the other or both of the following possibilities: (a) the burden of proving the existence of a valid reason for the termination as defined in Article 4 of this Convention shall rest on the employer; (b) the bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reason for the termination having regard to the evidence provided by the parties and according to procedures provided for by national law and practice".

199. The success of an appeal against unjustified termination of employment depends to a large extent on the ability of the worker/complainant to convince the competent impartial body of the justification of his complaint, which in turn will depend mainly on the evidence submitted. In cases of termination of employment, the application of the general rule applicable in contract law, whereby the burden of proof rests on the complainant, could make it practically impossible for the worker to show that the termination was unjustified, particularly since proof of the real reasons is generally in the possession of the employer. This is all the more true if there is no clear statement of the reasons by the employer, which may well be the case when the employer is not required to provide written reasons for the termination of employment. In an employment relationship, it is the employer who has the upper hand, particularly because he controls the sources of information.

200. The Convention therefore lays down the principle in Article 9, paragraph 2, that the worker must not "have to bear alone the burden of proving that the termination was not justified" and proposes several possible methods of achieving this. Under the first of these (Article 9, paragraph 2(a)), the burden of proving the existence of a valid reason rests on the employer. This text clearly indicates that the employer is required to present evidence showing that there is a valid reason, as defined by Article 4 of the Convention. It is the responsibility of the impartial

body to decide, in the light of the evidence presented, whether the termination is justified.

201. The second possibility (Article 9, paragraph 2(b)) consists of not placing the burden of proof on either the employer or the worker, but allowing the impartial body to reach a conclusion in the light of the evidence provided by the two parties. This implies that each party, in his own interest, will submit to the body the evidence at his disposal and which he considers as establishing his case, and that the body will use, where appropriate, any power of investigation accorded to it by national law and practice.

202. Finally, the third option is to provide for both of the above possibilities. The methods of implementation referred to in Article 1 must therefore include one or the other or both of these two possibilities.

203. The Convention therefore distances itself from the traditional concept of contract law, whereby the burden of proof is placed on the complainant. It is based in particular on the tradition of common law countries in which the employer was required to provide proof of the justification of termination of employment without notice for serious misconduct and on the concepts now current in other countries in civil proceedings in which the judge decides in the light of the evidence before him, mainly the evidence presented by the parties, thereby participating in the search for the truth, often with real powers of investigation. It is also linked to the principle whereby in labour disputes legal provisions must be interpreted in favour of the worker.

204. Many countries place the burden of proving the existence of a valid reason for termination of employment on the employer. This is the case in some countries which stipulate that the burden must concern the reason given to justify the termination and all the relating circumstances with a view to establishing proof that the termination was reasonable. The employer may be required to keep

relevant documents in the enterprise to be used in evidence in the event of appeal. In the specific case in which reasons based on the operation of the enterprise are invoked, the body is sometimes empowered to carry out an inquiry.

205. Several States which refer to the principle of "wrongful dismissal" indirectly place the burden of proof on the employer by defining wrongful dismissal as termination of employment without legitimate reason. Under the legislation of these countries, dismissal is wrongful if the employer is unable to prove the existence of a legitimate reason for termination of employment or the real and serious nature of the reason invoked. In some countries, the burden of proof is placed on the employer only if a certain category of worker is involved: this is the case for example in Belgium, where the concept of wrongful dismissal applies only to wage-earners and not to salaried employees, who must justify any legal action that they take and produce the necessary evidence.

206. Some countries recognize a presumption in favour of a worker whose employment has been terminated, which the employer must refute. For example, in Cyprus, in any court proceedings there is a presumption, unless there is proof to the contrary, that the employer has not terminated the employment of a worker for a valid reason. Sometimes, these presumptions are established for specific cases of discriminatory termination of employment. This is the case, for example, in Argentina, for women workers whose employment is terminated for reasons of maternity or marriage. In Italy, when the complainant provides proof (including statistical proof on practices with regard to termination of employment) which specifically and systematically justifies the presumption of discrimination based on sex, the burden of proof rests with the employer to refute this presumption. Furthermore, as regards anti-union discrimination, the legislation of several countries has strengthened workers' protection by requiring the employer to prove that the allegedly anti-union measure was based on reasons other than trade union activities; some texts expressly establish a presumption in favour of workers.

207. Since it is difficult for a worker who is the victim of discrimination (irrespective of whether the discrimination is anti-union or on other grounds) to prove that he has been the victim of such discrimination, the Committee considers that legislation and practice should contain measures to remedy these difficulties; the methods mentioned above could contribute in this respect.

208. In one country in which industrial relations are based mainly on collective agreements, legal provisions have sometimes been adopted to fill possible gaps in collective agreements. Unless an agreement provides for the contrary, these provisions place the burden of proof on the employer.

209. Some reasons may serve as criteria for reversing the burden of proof and transferring it to the employer. This may be the case, for example, with allegations of serious misconduct, given the negative consequences which such misconduct, if proven, would have for the worker, such as the loss of entitlement to a severance allowance.

210. Some countries have abandoned procedures which place the burden of proof on the complainant, but do not impose it on the employer either. Instead, they have adopted the alternative solution envisaged in Article 9, paragraph 2(b), of the Convention and do not impose the burden of proof on either party. In accordance with this solution, the parties each provide the competent body with the necessary facts to enable it to render a decision. Article 9, paragraph 2(b), specifies that the bodies shall be empowered to reach a conclusion "according to procedures provided for by national law and practice". In some cases, it may be laid down that, in order to reach its conclusion, the body may collect further information (other than that submitted by the parties) using all means of investigation considered appropriate. For example, in the Philippines, the competent bodies may resort to all reasonable means to allow them to rapidly and objectively ascertain the facts in each case. In Tunisia, the body, in this case the judge, can have recourse to all the means of investigation he deems necessary.

> 211. A problem may arise if the judge cannot reach a conclusion on the basis of the evidence, or following an inquiry, and if a doubt remains. In a number of countries, it is considered that where a doubt subsists the burden of proof should rest on the employer. In fact, as termination of employment is unjustified unless there is a valid reason, if it is impossible for the judge to ascertain that there is such a reason then the logical conclusion is to recognize that the conditions for such justification, and therefore the right to termination of employment, do not exist.

Be this as it may, the remedy for unlawful termination is not one and the same in all cases. It rather depends on the nature of the unlawfulness. Although, in substantial majority of the cases, it will be the employer who will engage in unlawful terminations, it is also possible that the employee could commit the same. Usually employers terminate employment contracts with out having lawful reason for so doing. At other times, they may have lawful reasons for termination at their disposal, but they may not follow the requisite procedure of termination (such as failure to provide notice where the law requires prior notice (Art.28 & 29) or provision of inadequate notice (Art.35) or failure to observe form & content of notice (Art.34)). All the same, broadly speaking, all of them are unlawful terminations. However the law tends to treat them in different manners.

Generally reinstatement(Arts.26(2)& 43(1)), compensation together with severance payment(Art.43(2),(3)(4) &39(1)(b)), payment inleu of notice period(Art.44 & 45), fine(Art.14(1)(c)&184(2)(c) are the remedies stipulated by law for unlawful terminations.

Note & Exercise

Please refer to Arts.43, 44 and 45 of the Labour proclamation and identify the distinction the legislature has made as to the remedies it attached for unlawful terminations; in substance (Art.43 (1) & (2) and terminations unlawful in procedure (Art.44 &45)

The legislature seems more serious about terminations on grounds mentioned under Art.26 (1) than the other terminations, because for such terminations it opted for

legislatively determined remedy on the basis of Art.43 (1) (i.e. reinstatement)rather than leaving it to be judicially determined. This means the employer will be compelled to accept "unwanted" service. Wouldn't this be a danger to industrial peace which is one of the objectives of the Proclamation? Why do you think is the legislature determined to taking such measure?

NB. Most of the protected grounds of discrimination under Art.26 (1) are unchosen, unchangeable and irrelevant for the purpose. For instance, one cannot choose her sex or ethnic origin; even with utmost effort or diligence one cannot change her sex or ethnic origin even if she decides to change that "negative factor". Last but by no means least, there is no scientific evidence which shows a link between productivity and sex, ethnic origin or religion. Thus it will be the most unfair and unjust misdeed to discriminate someone because of " possessing" a factor which she did not choose and which she cannot change it and which does not have any negative impact on her integrity or productivity.

Chapter III- Special categories of Employees

Under the preceding two chapters, we tried to briefly outline what employment relation is; and how could this relation be put to an end. Within this general framework, the legislature has provided for special treatment to some categories of employees. The rational for the special treatment is associated with the specific condition the employee is in. We will try to examine these features one by one.

3.1. Probationary employees

At the commencement of a contract of employment, the employer is entitled to set a probationary period (i.e. trial period). The purpose of probation is to test the suitability of the employee to a post in which she is intended to be assigned. Within the trial period, the employer is entitled to dismiss the employee with out any procedure if the employer is convinced that the employee is unfit for the post.

In this connection, it is held that "whenever a person is dismissed for unfitness, it is sufficient that the employer **honestly believes on reasonable grounds** that the person is unfit. It is not necessary for the employer to prove that she is in fact incompetent."
With regard to probation period, it is worth noting that the Labour law and the Civil Service Proclamation adopt varying positions.

Under the Civil Service, probation period is mandatory in the sense that every new employee should pass through the test and its length is specified by law and hence it is not subject to contractual bargain. This does not seem the case under the Labour Proclamation.

Exercise

Please refer Art. 11 of the Labour Proclamation and identify the basic features of probation under the law and compare it with the dictates of the Federal Civil Service Proclamation (Art.20 & 21) on the same subject matter. What similarities and differences did you observe between probation under the LP and the FCSP?

3.2. Apprentice

This is a situation through which the employer agrees to provide a person (i.e. the apprentice) complete and systematic training and the apprentice in return agrees to obey the instruction given to carry out the training.

Strictly speaking, such an arrangement is not an employment relationship because the main interest of the employer in this relationship is not to obtain service it is rather to provide training to the apprentice. On the other hand, the main interest of the apprentice, in this relationship, is not also to receive wage. It is rather to acquire skill. Incidentally, however, the employer will obtain service from the apprentice and the apprentice will receive stipend. These facts assimilate apprenticeship arrangement with employment relation.

An apprenticeship agreement is an appropriate route in transferring skill in those trades where skill could be acquired through "learning by doing" mechanism. Traditionally, those skills were being transferred through family line and it was members of the family who were exposed to such an opportunity. Through passage of time and the development of industrialization, however, contractual arrangement becomes the main channel for transfer of skills in such areas of trade.

An apprenticeship arrangement is only available for the employment regime under the labour law while civil service regime does not have such an arrangement. Even under the labour employment regime, it is strictly regulated in the sense that it must be made in writing and be attested by the Ministry (Art. 48(3))

As far as the law is concerned, not all trades are open to apprenticeship and hence the Ministry is empowered to spell out the list of trades open to apprenticeship and other related issues (Art.170 LP).

Problem

What happens if the contract of apprenticeship is not made in writing or even if written was not attested by the Ministry or both? Should it be held as though there was no any relation between the parties? or should it be held as though the parties have employment relation rather than contract of apprenticeship?

3.3 Young employees[30]

These are employees between the age of 14 and 18. Legally speaking, persons below the age of 18 are minors and due to this status they are not allowed to enter into juridical acts personally. As we all know, entering into a contract of employment is a juridical act. Hence it must be noted that the issue of young employees is an exception to the general rule. Actually it must be further noted that this is not the only exception in this respect. At the age of fourteen, a minor may be emancipated. (Art.312 (2) of Revised Family Code) Furthermore, a minor may make a valid will at the age of 16. (Art.295 (2)) Marriage is also possible at the age of 16. (Art.7 (2))

The Civil Service Proclamation, in principle, prohibits civil service employment below the age of majority (i.e. eighteen years of age). It, nevertheless, promises to come up with the Federal Civil Service Agency's Directive on how persons below the age of majority will be employed as civil servants(Art.14(2)).

Be this as it may, young employees, owing to their tender physical and mental make up, are treated differently under the labour law. Their differential treatment is manifested in the following terms of employment.

a) As regards to length of working hours and its timing:

-Normal working hours seven hours per day (refer Arts.61 (1) & 90)

-It is prohibited to employ young employees on:

- Night work (i.e. between 10pm-12am)
- Weekly rest days

[30] Reference to the UN Child Rights Convention is also recommended in order to possess full understanding of this issue. It is worth noting that Ethiopia ratified this Convention in 1992.

-Overtime work

-Public holidays

b) As regards to types of work

-No employment for young workers in the transporting of passengers and goods by road, rail air and internal water;

-No employment for young workers in dock sides and warehouses involving heavy lifting;

-No employment for young workers in electric power generation and transmission lines;

-No employment for young workers in under ground works (such as mines &quarries)

-No employment for young workers in sewerage systems and digging tunnels.

Problem

Who do you think is the responsible organ which should see to it that these provisions are complied with? To begin with, would such prohibition be relevant to the Ethiopian reality where a child needs to produce in order to feed him/her self? I mean wouldn't this be developed as world standard (i.e. Eurocentric standard)?

3.4. Female employees

It is well known that women have special and irreplaceable reproductive role in society. Because of this, their biological make up requires special care and attention. Moreover, most traditional cultural attitudes in society tend to discriminate against women in many respects. As an expression of these discriminatory practices, their share in the work force in most countries has been incomparable with their number in society. Hence in order to do away with such inequitable out come many modern legal systems have already incorporated the principle of "non discrimination on the basis of sex" in their basic laws and practices. The problem with this "sameness" model is that "it fails to address the reality that women's lives are different from men's. It aspires to an assimilationist model that takes male role as a norm and aims to encourage women to be just like men.[31] But in

[31] Linda Clarke," The role of law in equal opportunities," Making Gender Work(1995),p.55

order to achieve genuine equality, it is necessary to break away from the idea that men's lives are the norm and recognize the women's lives are different.

Because of this, the principle of non discrimination, though necessary, is not sufficient by itself to bring about equitable outcomes in this respect. Thus in order to bring about equity the principle of non discrimination must be complimented by another equally important principle so called "*affirmative action*". Unless and until these two principles are reinforced each other, past misdeeds and previous marginalization may not be rectified and thereby true equality will not be attained.

In this connection, the Ethiopian legal system appears to be on the right track. The FDRE constitution has already incorporated both principles in its body of provisions**. *(Please pinpoint these principles from the operative part of the Constitution)***

As an extension of these approaches both the Civil Service Proclamation and the Labour Proclamation have included provisions with similar tone and content. Arts.13 & 41of the Federal Civil Service and Arts. 14, 87, 88 of the Labour Proclamation could be of some help in understanding the position of the laws.

The law tries to regulate the situation of female employees from two angles. The first type of regulation is providing flat protection available to all females by virtue of being female." *Women shall not be discriminated against as regards employment and payment, on the basis of their sex*" (Art.87 (1) Labour Proclamation). The other type of regulation is providing special provisions for females under particular circumstances such as pregnancy and maternity. (refer Arts. 87(3), (4),(5) &88 of Labour Proclamation) It must be noted however that the principle of non discrimination may be deviated from through what is so called "inherent job requirement or genuine occupational qualification" (***please provide an example to elaborate the case)***

Problem for consideration

Some people tend to hold the view that though such protections are necessary for female employees, they may substantially reduce their employment opportunity owing to the fact that employer may not be ready to cover the whole expenses. For instance, maternity leave under the Civil code of 1960 was one month and it was only half of it that was paid (Art.2566). Under Proc. No.64/75 such leave was upgraded to forty five days and all of it was paid leave (Art.39 (2)). With the coming into force of Proc. No.42/93 maternity leave was further increased to three months in duration (pre & post natal) with full pay (Art.88) and this has been carried forward to the currently in force Proclamation (i.e. Proc. No.377/2003). Similar position has been adopted by the Federal Civil Service Proclamation in this respect (Art.41). The Civil Service even allows for aggregation of maternity leave.

Reproduction is to the benefit of the family and society at large; if so, shouldn't the family and society (i.e. the state as representative of society) share the cost of maternity leave? Why should the employer be compelled to solely cover such expense? Wouldn't such obligation discourage employers from employing young females who can potentially be pregnant?

In this connection, a Study conducted by EWLA[32] has the following to say: "The fear that is generally expressed is that, even such legitimate special treatment will eventually harm women's interest if the payment of benefits is primarily borne by the employer. Our sample survey showed that 47% of the employers said that maternity leave is very costly and 36% said that society should bear part of the cost. The prevalence of such view amongst employers and their profit motive makes it likely that they may respond by discriminating women of childbearing age in recruitment".

Is this really well founded fear and concern? If so, what type of alternative(s), which will have least restrictive effect to female employment opportunity, do you propose?

[32] See, ***Berchi,*** The Annual Journal of Ethiopian Women Lawyers Association, NO.5(2004), p.29

3.5. Employees with disability

Studies have verified that over 600 million people worldwide have a physical, sensory, intellectual or mental impairment in one form or another. This equals approximately 10% of the world's population. People with disabilities can be found in every country, with over two-thirds of them living in the developing world. Throughout the world there is an undeniable link between disability, poverty and exclusion. The denial of employment opportunities to people with disabilities forms one of the root causes of poverty and exclusion of many members of this group.[33]

There is ample evidence that shows that people with disabilities are more likely than non-disabled persons to experience disadvantage, exclusion and discrimination in the labour market and elsewhere. As a result of these experiences, people with disabilities are disproportionately affected by unemployment. When they work, they can often be found outside of the formal labour market, performing uninspiring low-paid and low-skilled jobs, offering little or no opportunities for job promotion or other forms of career progression. Employees with disabilities are often under employed.

The issue of disability is something that deserves serious attention in Ethiopia. The level of poverty we are in will make us major producers of persons with disability. Lack of adequate medical facility and vaccination during pregnancy or childhood is one major cause for such an out come. Moreover, lack of education associated with harmful traditional practices will also have their own share in this respect. Absence of tolerance and respect to each other, which resulted in prolonged civil war; and which has been responsible for tribal and at times religious conflicts, are also relevant in the equation. Due to these all manifestations of poverty, Ethiopia has an appreciable number of persons with disability.

Against this background, recent Ethiopian legal instruments have incorporated relevant provisions with a view to widening the employment opportunity of persons with

[33] ILO Guidelines, *Achieving Equal Employment Opportunities for People with Disabilities through Legislation, Geneva(2007), p.1*

disability. A case in point is the FDRE constitution which stipulates," ***The State shall, within available means, allocate resources to provide rehabilitation and assistance to the physically and mentally disabled,*** the aged, and to children who are left without parents or guardian"(Art.41 (5) emphasis added). Proclamation No.568/2008 has also important provisions for persons with disability. The principle of "reasonable accommodation" for persons with disability seems to have been incorporated in this Proclamation (Art.6 of the Proclamation).

The principle of non discrimination on grounds of disability has also been expressly inserted under the FCSP (Art.13 (1)). Though not as express as the FCSP, the LP prohibits discrimination among employees "…on the basis of nationality, sex, religion, political outlook or ***any other condition***."(Art.14 (1) (f) emphasis added) It may be logical to assume that the phrase "…any other condition" may be construed to include disability as a protected ground.

As mentioned on discrimination on the basis of sex above, the inherent job requirement exception to the general principle is applicable in this case, too. For example, ***a taxi company requiring job applicants to have driving license excludes visually impaired people as well as people who, due to a medical condition, no longer have a driving license. Such a license requirement on the part of the taxi company is legitimate and proportionate and therefore constitutes a genuine or justifiable occupational requirement***.

(**Extract from** "***Achieving Equal Employment Opportunities for People with Disabilities through Legislation" (ILO, Guideline)***

Disability as a human rights issue

For a long time, disability was treated primarily as a social welfare issue. This reflected the widely held belief that people with disabilities needed care and assistance, being unable and incapable of living their own lives. As a corollary, people with disabilities were seen as objects of social welfare and not as subjects in their own right, let alone

entitled to the full enjoyment of the right to work. Due to their marginalized position in society and resulting invisibility, as well as widespread prejudice, people with disabilities did not fully enjoy their human rights, including the right to decent work.

The human rights charters and conventions adopted from the mid1940s to the late 1960s – such as the United Nations Universal Declaration on Human Rights, 1946, the UN Covenant on Economic, Social and Cultural Rights, 1966, and the UN Covenant on Civil and Political Rights, 1966 - do not specifically mention people with disabilities. It is only since the 1970s that the disadvantages faced by disabled persons, their social exclusion and discrimination against them were increasingly perceived to constitute a human rights issue. The shift from a social-welfare approach to one based on human rights is reflected in explicit reference to persons with disabilities in human rights charters, conventions and initiatives adopted since the 1980s and in an increasing number of special – and usually non-binding – instruments adopted by such organizations as the UN and the Council of Europe. These instruments include the Council of Europe Coherent Policy for the Rehabilitation of Persons with Disabilities, 1992, and the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities, 1993.

On 19 December 2001, the UN General Assembly adopted Resolution 56/168 establishing an "Ad Hoc Committee, open to the participation of all Member States and observers of the United Nations, to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disability, based on the holistic approach in the field of social development, human rights and non-discrimination and taking into account the recommendations of the Commission on Human Rights and the Commission for Social Development." On the recommendation of the Ad Hoc Committee (AHC) at its Second Meeting in June 2003, a decision was taken to proceed with the development of such a convention. Following three years of negotiation involving governments, with active participation of UN agencies, organizations of persons with disabilities, national human rights institutions and other civil society representatives, the draft text of the Convention including an optional protocol, was approved at the Eighth Session of the AHC in August 2006. The UN

General Assembly formally adopted the Convention in a vote by consensus **on 13 December 2006.**

Similar shifts from a social welfare to a human rights law approach are taking place on a regional and national level, with an increasing number of existing human rights instruments being amended, to include the rights of people with disabilities, and new instruments being adopted, both comprehensive and disability specific.

The concept of disability

When legislation is being formulated to eliminate the disadvantages faced by disabled persons, to dismantle the exclusionary mechanisms they face in society, and to enhance equal employment opportunities for them, the question arises of how to define the beneficiaries of the legislation. In other words: what constitutes a disability?

In this discussion, two opposing views can be distinguished. On the one hand, there are those who situate the problems of disability in the person concerned, while paying little or no attention to his or her physical or social environment. This is referred to as the individual or medical model of disability. On the other hand, there are those who perceive disability as a social construct: disabilities result from the failure of the physical and social environment to take into account the needs of particular individuals and groups. According to this social model of disability, society creates disabilities by accepting an idealized norm of the physically and mentally perfect person and by organizing society on the basis of this norm.

Examples:

According to the individual model of disability, a person with mobility impairment is disabled as a result of an individual impairment. He or she can try to overcome the functional limitations which come along with this by undergoing medical or paramedical treatment and/or by using medical or paramedical aids, such as a wheelchair or crutches. According to the social model of disability, mobility impairment should be seen in the context of the surrounding society and environment. Reducing or overcoming the limitations on activities and restrictions to participation associated with mobility

impairment implies taking away societal barriers, and ensuring that the built environment is accessible.

- ❖ Both the social and individual models of disability have proven to have advantages and constraints, depending on the aim of the legislation. The individual or medical model can be particularly helpful in such fields as rehabilitation medicine and social security law, while the social model can be instrumental in tackling the root causes of exclusion, disadvantage and discrimination. The social model recognizes that the answer to the question of whether a person can be classified as disabled is intrinsically related to such factors as culture, time and environment.

Defining disability in legislation

The definition of disability, which determines who will be recognized as a person with a disability, and hence protected by the relevant legislation, is very much dependent on the goal being pursued by the particular law or policy. Thus, there is no single definition of disability which can be used in all labour and social legislation. The two different approaches to definition are as follows.

- Wording aimed at a narrow, identifiable beneficiary group. This should be used if the aim is to craft laws to provide financial or material support to disabled individuals, or employers of disabled people. A limited, impairment-related definition of disability (individual model) thereby ensures that support is targeted at those who are most in need.
- Broadly inclusive wording aimed at protection from discrimination on the grounds of disability. This broader definition of the protected group (social model) should be used in anti-discrimination laws because many people, including those with minor disabilities, people associated with people with disabilities and those who are wrongly assumed to have a disability, can be affected by disability-based discrimination.

Reasonable accommodation

Disability can sometimes affect an individual's ability to carry out a job in the usual or accustomed way. The obligation to make a reasonable or effective accommodation, or the right to be accommodated, is often found in modern disability non-discrimination law.

Disability non-discrimination legislation increasingly requires employers and others to take account of an individual's disability and to make efforts to cater for the needs of a disabled worker or job applicant, and to overcome the barriers erected by the physical and social environment. This obligation is known as the requirement to make a reasonable accommodation.[34] The failure to provide a reasonable accommodation to workers and job applicants, who face obstacles in the labour market, is not merely a bad employment practice but is increasingly perceived as an unacceptable form of employment discrimination.

Examples of a reasonable accommodation:

- an adjusted office chair (for a person with a back impairment), adapted working hours (e.g. for a person with a medical condition requiring frequent rest-breaks),
- a computer keyboard with a Braille reader (for a blind person), and
- the assignment of a job coach (e.g. for a person with an intellectual or mental health disability).

The law should define closely what is meant by reasonable accommodation, so that misinterpretation is avoided and employers clearly understand what they must do.

Example:

In the **United States**, the obligation to make a reasonable accommodation is to be found in the Americans with Disabilities Act, 1990. Reasonable accommodation is understood to mean any change in the work environment or in the way a job is performed that enables a person with a disability to enjoy equal employment opportunities. There are three categories of "reasonable accommodations": changes to a job application process, changes to the work environment or the way a job is usually done, and changes that enable an employee with a disability to enjoy equal benefits and privileges of employment, such as access to training.

[34] The obligation is also sometimes referred to as a reasonable adjustment or an effective accommodation/ adjustment.

Other countries, including Australia, New Zealand and South Africa have legal provisions stipulating that the failure to provide a reasonable accommodation constitutes a form of discrimination.

The Ethiopian Act for the Right to employment for Persons with Disability of 2008 defines "a person with disability" ***as an individual whose equal employment opportunity is reduced as a result of his physical, mental or sensory impairments in relation with social, economic and cultural discrimination***.

Shifting the burden of proof

Under some legislation, a person who considers his or herself wronged because of discrimination has to produce evidence to prove that this has occurred. In some cases it may be possible to collect this necessary evidence without difficulty – such as in the case of recruitment, where advertisements for job vacancies and recruitment materials are easily available. In other cases, involving an action which is suspected rather than established, it may prove impossible to gather credible evidence. This is true, for example, when the information and records that might constitute evidence are held by the person against whom the claim is made (for example, by an employer in an equal pay case). This person may be able to win the case by saying nothing and simply challenging the evidence produced. In practice, this requirement has been recognized as one of the greatest obstacles to obtaining a fair and just result.

To deal with this major procedural problem, many countries have shifted the burden of proof away from the person bringing the claim to court. In many jurisdictions it now suffices for such a person to establish, before a court or other competent authority, facts from which it may be presumed that there has been discrimination. After this, it is for the person who allegedly discriminated to prove that there has been no discrimination. Such a shift of the burden of proof does justice to the fact that it is usually very difficult, if not impossible, for a person to prove that he or she have been subjected to discrimination. A reversal of the burden of proof makes non-discrimination law effective.

In 2003, all fifteen countries of the **European Union** (EU) were required to introduce

laws or amendments to their laws or other legal instruments to allow for a reversal of the burden of proof in employment discrimination cases involving direct or indirect discrimination. All new Member States will also have to follow suit. This follows from a European Union law (a directive) adopted by the Council of Ministers in the year 2000. The Directive stipulates that disability discrimination cases are subject to a reversal of the burden of proof in favour of the employee or job applicant with a disability from 2003 onwards.

The Disability Act of Ethiopia (2008) has also incorporated this principle. It reads as follows: 7(1) *Any person with disability who alleges that discrimination on ground of disability existed with respect to recruitment, promotion, placement, transfer or other conditions of employment may institute a suit to the competent court on the issue with out the requirement of the burden of proof.* 7(2) The defendant to a suit instituted pursuant to sub-article (1) of this article shall be responsible to p[rove that there was no act of discrimination thereof.

3.6. Non Ethiopian employees

With the integration of the global economy, goods and services have been crossing borders at ease. With a relatively relaxed freedom of movement of persons across borders, labour in the form of service needs a certain degree of regulation when it avails itself outside of its country of origin.

The international division of labour with respect to trade in goods seems to have its reflection on trade in services, too. With respect to trade in goods, the South(developing countries) exports raw materials at cheap price to the markets of the North(developed countries), while the latter ships finished and expensive goods to the markets of the South. By the same token, unskilled, more often than not, illegally exported and cheap labour is being exported from South to North; the North lawfully exports professional/skilled and highly expensive labour to the markets of the South.[35] Informally

[35] As an exception to this general trend, it has been witnessed that few skilled human power cross the borders of the North from South through the "brain drain arrangement".

speaking, labour exported from South to North is assigned in the so-called "3d jobs" (i.e. Dangerous, Demanding and Degrading) where the nationals of the host state are **unwilling** to engage in. Conversely, labour exported from North into the South will be employed in white collar jobs where the nationals of the host state are **incapable** of engaging in. It appears that such a reality seems to remain intact for some years to come, if not decades.

Every country has an express or implied policy on how non nationals are to avail themselves to its domestic labour market. As expression of this sovereign authority, the Ethiopian legislature lays down conditions on the basis of which foreign nationals may be employed in Ethiopia. (refer. Art.174 LP & Art.15 & 22(2) FCSP). Ethiopian law seems to give priority of employment to its nationals which is in consistent with the general practice of states world wide. It is when a particular type of service is not available in the domestic market that a foreigner may be employed. Moreover, employment of foreign national is temporary and for limited duration. It must also be noted that there are specific areas of employment where foreigners may not have access to employment such as defense, security and foreign affairs.

As a requirement, for a foreigner to be lawfully employed in Ethiopia, he/she needs to possess double permits.(namely; Residence Permit & Work Permit) The Power to issue Residence Permit is vested on the Security, Immigration and Refugee Affairs Authority; while Work Permit is to be issued by the Ministry of Labour and Social Affairs.(Art.174 LP)

Under the Civil service employment regime, there is an express provision which stipulates "a person who is not an Ethiopian national may not be eligible to be a civil servant". Nevertheless, the same instrument seems to provide exceptions to the general rule with respect to foreigners of Ethiopian origin (Art.15 FSCP). Even in situations where it is impossible to fill a vacant position that requires high level professional by an Ethiopian, it is only for temporary bases that a foreigner may be employed (Art.22 (2)). Such measure also requires a directive from the Federal Civil Service Agency.

Chapter IV- Legally stipulated minimum working conditions

The preceding chapters have provided insights into the meaning of employment relation it and basically it was pointed out that it is a contractual relation. Nevertheless, this is part of the truth. Unlike most contractual engagements where the parties to the contact are left alone to determine the terms of their contractual relation, employment relation has its bench marks (the so called minimum working conditions) below which the terms of the contract may not stipulate.

The rational behind stipulating minimum working conditions is predominantly attributed to what economists call *market failure*. As employer and employee are not on equal bargaining strength, leaving them alone to define their terms of contract failed to bring about equitable out come. As the market did not work well in this respect, manifestations of failure such as injustice and instability of industrial peace became the order of the day. Hence, freedom of contract (i.e. market) failed in this regard. State intervention has been warranted in situations of market failure and this seems why many governments decide to intervene, through law making, and come up with minimum working conditions.

Most provisions of minimum labour conditions are related, but not limited, to prescribing minimum wage; limiting daily/weekly working hours; provision of paid leaves; employment security; maintenance of safe and healthy working condition and compensation for employment injury.

4.1. Minimum Wage

Many jurisdictions have succeeded in prescribing minimum hourly/monthly wages to employees working within their territory. Others leave this issue to the contracting parties. The Ethiopian employment regime seems to adopt a hybrid of the two approaches. The civil service regime has prescribed a minimum monthly wage for those

working in the civil service;[36] while the labour law regime has left the issue to the parties themselves.

The rational for such double standard from the side of the Ethiopian government may be explained away in the light of its economic philosophy. It is believed that in a free market economy, price of goods and services is to be fixed by taking into account the supply and the demand side of the item in a forum of bargain. This could be the main reason why the government opted for deregulation with regard to the private sector. As regards to the civil service, however, since the government is the sole employer, it can come up with a rule binding upon itself. This can also serve as a reference for the private sector while negotiating on wage and other related benefits.

The problem associated with such an approach is the invalidity of considering labour as a commodity whose price is to be determined against supply and demand. The ILO Conference under the annex for its Constitution reaffirms that "labour is not a commodity" (Annex-I (a)). Furthermore countries like the US who claim to be the most faithful exponents of free market economy see nothing wrong in determining minimum hourly wage by law. In light of these, the position of the Ethiopian government seems to deserve second thought.

Exercise

What do you think the pros and cons of stipulating minimum wage in the present day Ethiopian reality are? Assume that the Ethiopian government is convinced towards prescribing minimum wage, How should it go about it? Stipulating minimum wage for the lowest possible wage or stipulating minimum wage for each possible job classifications?

4.2. Employment security

Another item for minimum working condition is trying to protect the employee from unjustified dismissal. Employment, for a worker, is not only a source of revenue but also

[36] The current minimum monthly wage is Birr 320.

an engagement for career development and an expression of human dignity. Traditionally, in contract of employment, both parties were to remain engaged so long as both of them are willing to remain engaged. If either of the parties did not want to continue with the engagement, either was entitled to put an end to it. Compelling the employee to remain employed against his/her will was tantamount to legalizing slavery or forced labour. Likewise, it was held that equity would not force the acceptance of unwanted service by the employer.

Modern employment relation has slightly deviated from such an understanding. Although the employee is still at liberty to terminate his/her contract of employment with cause or without cause subject to prior notice,(Art.31 LP & Art.78 FCSP), such entitlement is not widely available to the employer. This is an aspect of expression for ensuring employment security to the employee as employment is a means to survival for him/her.

ILO has adopted "Termination of Employment Convention No.158" which stipulates: *the employment of a worker shall not be terminated unless there is valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service"(Art.4).* Furthermore, it has been stated that the scope of application of the Convention is *"... to all branches of economic activity and to all employed persons" (Art.2 (1).*

The need to base termination of employment on a valid reason is the cornerstone of the Convention's provisions. The adoption of this principle removes the possibility for the employer to unilaterally end an employment relationship of indeterminate duration by means of a period of notice or compensation in lieu thereof. It should be noted here that the question of termination of employment for a valid reason is distinct from that of a worker's right to a period of notice and a severance allowance. The Convention requires that there be a valid reason for termination of employment, whether it is terminated following a period of notice or not. National laws and practices that only require a valid reason for termination of employment where there is no period of notice and that do not require justification for termination of employment when notice has been given are not in accordance with the Convention.[37]

[37] Report of Committee of Experts, Protection against Unjustified Dismissal, ILO(1995), p.31

Ethiopia ratified this Convention in 1991 and hence it is an integral part of Ethiopian law. Consequently, current Ethiopian laws, in compliance with the country's ILO commitment, try to prohibit unjustified dismissal through different modalities. The first step is laying down the grounds of termination exhaustively and catagorising terminations outside of these grounds as unlawful. The second step is spelling out a procedural mechanism through which the legality or otherwise of terminations would be examined by a neutral tribunal. The third step is prescribing a presumption in favour of a contract of employment for indefinite period which in effect means employment security is presumed. The fourth step goes towards empowering the neutral organ to hold the employer liable for unlawful terminations.

The extent of liability of the employer may extend to reinstating the employee to his/her previous employment or payment of compensation in lieu of reinstatement. Penalty may also be a possible measure against unlawful termination. (***Please look for specific provisions under LP and FSCP which are relevant in this regard and determine their adequacy for the purpose.)***

4.3. Normal Working hours

By normal working hours, we mean those periods in a day or in a week when the employee regularly renders service to the benefit of his/her employer. Historically, determination of working hour was left to the parties' bargain. An attempt to limit working hours by law was being held an interference of the state into a private domain. For instance, in1905, in ***Lochner vs New York*** case, the US Supreme Court struck down a New York law limiting work in bakeries to ten a day on the ground that it interfered with the freedom of contract between employers and employees. Through passage of time, however, it becomes a general practice to fix maximum hours of work by law and/or by collective agreement. In fact, limitation of maximum working hours became one of the most important concerns of labour laws of various jurisdictions. Actually, in 1919, ILO came up with a convention which embodied eights hours/day as the normal working hour.

Ethiopia, for the first time, introduced a provision limiting working hours in 1964 through a Regulation issued pursuant to Proclamation No.210/63. It was then stated that normal working hours shall be eight hours in a day and forty eight hours in a week. Currently, regular working hours for employees under the civil service and labour have slight differences. Under the civil service, it has been stipulated that "regular working hours of civil servant shall be determined on the basis of the conditions of their work and shall not exceed 39 hours a week."(Art.32). Under the Labour Proclamation, however, "normal hours of work shall not exceed eight hours a day or forty eight hours a week" (Art.61 (1))

In order to ensure the reliable application of this limitation, the law has further introduced additional safety valves. First of all, it declared that overtime work is in principle prohibited. It is only in cases where exceptional circumstances expressly stated by law have occurred that overtime work is allowed. (Arts.66 & 67 LP; Art.34 FCSP). Secondly, even if conditions for overtime work are met, the rate of payment for overtime work is being made expensive partly to discourage the employer from requiring overtime work. (Art.68 LP). Thirdly, an employer who "causes workers to work beyond the maximum working hours set forth by or contravenes in any manner the provisions relating to working hours is liable to fine"(Art.184(1)(a) LP).

Related with these, the laws grant a certain amount of paid leaves in the form of annual leave. It is believed that the purpose of annual leave is to enable an employee get rest with payment and resume work with renewed strength thereafter.

When one looks at the historical development of annual leave in Ethiopia, it was first introduced through the Civil Code of 1960. It was then 10 consecutive days per year for a service of more than one year up to five years; 15 days for a service more than five and up to fifteen years; 20 days for a service more than fifteen years(Art.2562). Four years latter, Regulation No.302 of 1964 on minimum labour standards came up with more generous amount of annual leave. It provided as follows:

-14 consecutive days for a service of at least one year up to three;

-16 consecutive days for a service more than three years and less than five;

-20 consecutive days for more that five years and less than ten;

-25 consecutive days for more than ten years of service. (Art. 5 of the Regulation)

Then comes Labour proclamation No.64/1975 which stipulated 14 working days of annual leave for the first year of service and an additional one working day for every additional year of service. Unlike the two preceding legal instruments, this proclamation employed the phrase "…*working days*" instead of "*consecutive days*". ***Is there any difference between the two? Are they interchangeable?***

Both the LP and the FCSP which are currently in force have adopted the terminology of the recent instrument (i.e working days). Actually, the civil service grants 20 working days for one year of service and it will be increased by one additional working day for every additional year of service the maximum ceiling being 30 working days (Art.37 FCSP). The labour proclamation on its part provides 14 working days as an initial leave for the first year of service, and one additional working day for every additional year of service with no maximum limit (Art.77 LP). Nevertheless, it is important to note that the annual leave under the civil service is the minimum and at the same time the maximum while that of the labour proclamation is only the minimum as it can be increased through individual contract of employment, work rule or collective agreement.

Sick leaves and public holidays are also items of minimum working conditions. Under the Civil Code, "the employee was entitled to one month sick leave which was half paid where the employee had worked one or more years to the employer"(Art.2542). It was with the coming into force of Proc. No.64/75 that the employee received prolonged sick leave. Sick leave on the basis of that proclamation was six months in duration out of which the first month was with full wage payment; the next two months with half pay and the last three months with no wage payment (Art.38).

Currently, the present labour proclamation incorporated the stipulations of the previous labour proclamation with respect to sick leave. The civil service regime appears to be more generous in this regard. It grants eight months sick leave out of which the first three

months are fully paid; the next three months will be with half pay and the remaining two months will be with out payment.

Public holidays are also non working days and at the same time paid holidays. During the time of the late emperor Haileselassie, public holidays were predominantly associated with the birth day, date of Coronation of the emperor and religious holidays of the Ethiopian Orthodox Church. That was a reflection of the then existing Imperial rule and authority on the one hand and religious favouritism on the other.

With the assumption of political power by the military regime, locally known as the ***Derg,*** a paradigm shift in the designation of public holidays was being witnessed. Ever since that period, public holidays have had national, international or religious features. Among the national holidays; Victory of Adwa (Commemoration)(March 01), Victory day(May 05) are some. The international one is May Day (01) (International Labour Day). The religious ones tried to address the religious interests of the two dominant religions in Ethiopia (i.e. Christianity & Islam). **(for the list of public holidays, please *refer Public Holidays Proclamation No.16/1975(as amended)***

4.4. Safe and Healthy working conditions

It is well known that industrial activities are full of risks. Risks could be either to life, health, property or the environment or to all. The Risk may express itself in the form of accident, occupational disease or environmental pollution. More often than not, employees are the most exposed sector of society to the risk.

Traditionally, where an employee sustains employment injury, it was himself/herself who would be responsible to remedy the injury. Some of the justifications for such an approach were that the wage which was being paid by the employer included payment for possible risks; and the principle of "voluntary assumption of risk" in which the employee assumes the risk of being harmed when he/she decided to work on such circumstances. Both of these served towards justifying "let the damage rest where it falls" and hence the employee was held as his own insurer.

In connection with this a certain American writer stated the following. "Early common law duties of master to provide safe workplace became effectively eviscerated by the mid-nineteenth century by three common law defenses available to employers. The three legal doctrines, contributory negligence, assumption of risk, and fellow servant rule, formed the "unholy trinity" of employer common law defenses. First, workers whose own negligence had contributed to their injuries were barred from recovery under the contributory negligence rule. Second, a worker was deemed to have assumed the risk of accidents by accepting employment. By accepting employment without specific reservation of protection against accidents, workers were deemed to have bargained away their rights to hold the employer responsible for risks known to them or normally incident to that kind of employment.

Unlike contributory negligence and assumption of risk, which were general common law defenses that also could be applied in the workplace, the third defense, the fellow servant rule, was exclusively a rule of the workplace. Based on this, the assumption goes, by accepting employment, the worker could be deemed to have assumed the risk of negligence of his fellow servants.

Thus, the nineteenth century common law rules left the burden of injuries on the working people who suffered them, regardless of whether they had the ability to avoid the accident, change the degree of danger, or even object the dangerous condition. The general employer duty to provide a safe workplace came to be weakened by three ever more broadly interpreted exceptions and by the legal fiction that the working person was deemed to have assumed the risk of his or her bargaining for the job."

Through passage of time, however, this position gave way to the principle of transfer (passing off) of risk. Many jurisdictions adopted employer's liability for employment injury cases. The Ethiopian legal system has had also expressly incorporated this principle ever since the promulgation of the Civil Code in 1960 (Arts.2548-2559).

The reason for such a paradigm shift has been more of economic and equity. In economic terms, when an employer is held liable to cover the costs of employment injury, it will

transfer such cost into society by thinly distributing this expenditure in the price of the product or services which is made available by the employer. Hence it is in a better position than the employee to pass off the cost to the consumers. Furthermore as the employee sustains injury while at the disposal and service of the employer, it is economical justified and equitable if it is held liable because if it benefits from the service of the employee, it should compensate when loss occurs. Finally, under the "deeper pocket" principle, the employer is an economically better position to cover such cost even if it fails to pass it off to society.

Be that as it may, employer's liability in this connection has two levels (namely; at the level of prevention and at the remedial stage).

4.4.1. Preventive measures

At the level of prevention, the employer is duty bound to prevent preventable risks. For this purpose, it is required to provide safety equipments and train how and when to make use of them (Art.92 LP). Nevertheless, it is worth noting that the employee has also a corresponding duty at the level of prevention. He/she is required to make use of the protective tools appropriately and at appropriate time and place (Art.93 LP). Furthermore, he/she is obligated to obey all health and safety instructions. Hence prevention demands the care of both parties (i.e. bilateral care).

It must be admitted that prevention may not be successful all the time. Even with utmost care, it is likely that employment injury may occur. Thus regulating prevention, though necessary is not sufficient in this regard. With this view in mind, the law comes out with provisions necessary in regulating the remedial stage.

4.4.2. Remedial measures

By remedial stage what we mean is, taking compensatory measures after the damage has already been sustained. This stage, in actual effect, is pin pointing the modalities for loss distribution. Once industrial accident or occupational disease is sustained, the employer is expected to cover cost of medication including the cost for any necessary prosthetic or orthopedic appliances. Hence employer's liability is not limited to the stage of prevention. It rather covers the remedial stage also so long as the injury is associated with the employment. This will take us to identifying what employment injury is.

Extract from "Simplified guide to Ethiopian labour law" By Mehari Redae

Employment injury could be categorized into two. They are either occupational accident or occupational disease (Art 95(2) LP & Art.47 (1) FSCP).

Occupational accident is any organic injury or functional disorder sustained by an employee:

-while carrying out the employer's order at a place and time of work ;(*e.g. one below*)

-while at the place of work before or after his work or during tea or lunch breaks *;(e.g. two below)*

-while the employee is proceeding to or from place of work in a transport service provided by the employer *(e.g. three below*).

E.g. one

Bekele's right hand was seriously injured while he was operating a machine at his place of work.

E.g. two

Sosna sustained injury when fire broke out at a cafeteria within the compound of her place of work during a tea break while she was drinking tea. Although she was not performing work at the time of the injury, she was there for the purpose of the work and hence her injury is assimilated to occupational accident.

E.g. three

Seyoum was going to his place of work when the car he was in collided with a train. He thereby sustained serious bodily injury. The vehicle he was in was a bus assigned by his employer to transport employees to and from place of work.

Another workmate of Seyoum, Shifa, similarly sustained injury on his way to work place using a taxi. Shifa hired the taxi by money he received from his employer in the form of transport allowance.

Seyoum's injury is employment injury while Shifa's is not. The reason is Seyoum was going to work through a means of transport chosen and assigned by the employer and hence the employer is responsible for the consequences of its actions. But Shifa was

proceeding to work through a means of transport chosen by him. Thus he was going to work at his own risk and hence no employer liability.

Occupational disease, on its part, is any pathological condition whether caused by physical, chemical or biological agents which rises as a consequence of :

-the type of work performed by the employee or

-the surroundings in which the employee is obliged to work.

Nevertheless, occupational disease does not include endemic and epidemic disease which is prevalent in the area where the work is done. Such disease will be occupational disease for those employees who are exclusively engaged in combating such diseases by reason of their occupation.

E.g. *Osman was a store keeper in a certain cotton plantation in Afar for five years. While at work, he contracted malaria and died due to it. His family instituted a court action against the cotton plantation for compensation claiming that their breadwinner died due to occupational disease.*

The claim of the deceased's family is untenable under the law. Malaria in afar is an epidemic disease and hence contracting malaria in Afar is a ***generally available risk*** to inhabitants of the locality whether employed or not. Thus, it cannot be held as occupational disease.

Another example, *Seid is a health officer in the same cotton plantation. His job responsibility was looking after the well being and health of the employees including malaria prevention. While on duty, he contracted malaria.*

It is an occupational disease for Seid because he is exposed to increased risk of malaria contraction more than anybody else due to his job responsibilities. Hence he should be protected from such risk if he is to effectively render service under the contract.

4.4.3. Exemption from liability

As indicated earlier, employer's liability is limited to employment injury cases. Employment injuries as indicated above are predominantly injuries sustained at the place and time of work and injuries some how related to work. Thus, the employer is not an all time (i.e. twenty four hours) insurer of the employee as regular working hours is only

eight hours per day. Even for injuries sustained at the time and place of employment, there are exceptional situations where the employer can validly avoid liability. A case in point is where the employee intentionally caused the injury on her/himself.

Although it may be difficult for the employer to show that the employee intentionally caused the injury on her/himself, the law has laid down presumptions in its favour. Among the presumptions are, when the employee does not obey safety instructions of the employer or when the employee reported to duty under the influence of alcohol or chat and sustained the injury while in such circumstances. The employer will be exempted from liability and the damage will rest where it falls.

It has been stated earlier that one of the statutory obligations of an employee is to report for duty in fit physical and mental condition (Art.13 (4) &14(2) (c) LP). Thus when an employee reports for duty under the influence of intoxication, s/he, in effect, is violating one of his/her primary obligations. This seems the reason why such an employee is denied of employment injury benefit.

4.4.4. Extent of liability

Once a certain injury is held to be employment injury and the employer has no ground to invoke in view of avoiding liability, the next step will be determining the scope of its liability. Although the scope of liability is closely related to the degree of injury sustained by the employee, there are common obligations which are applicable to all injuries. These are:

a) Immediate obligation

As soon as the employee is known to have sustained employment injury, the first step the employee is expected to do is:

-provision of first aid service to the injured employee;

-transporting the injured employee to the nearest medical facility.

- notifying the appropriate government organ about the incident.

b) Medical expenses

Subsequent obligation imposed on the employer will be, covering the following costs of medical expense:

-costs of medical and surgical care;

-hospital and pharmaceutical costs;

-cost of artificial facilities for the injured when recommended by Medical Board.

Problem

What if the injury sustained by the employee demands and is verified by the medical board for medication abroad, Will the employer be required to cover such costs?(discuss)

4.4.5. Disability Benefits

The employer's liability is not limited to cost of medication. It will further be obligated to provide disability benefit to the employee. The amount of the disability benefit is to depend on the degree and duration of disability.

Ordinarily, disability may be temporary or permanent. It may also be total or partial; the worst scenario, of course, is death.

E.g. (1) Amare sustained a severe car accident while delivering goods for the company and he was prevented from rendering his employment service for six months due to the accident. Such disability is total and temporary. It is total because the employee was totally preventing from providing service. At the same time, the disability is temporary because the employee was prevented from rendering service for only six months.

E.g(2): Petros lost his right arm due to an accident associated with his employment. This kind of injury is partial and permanent. It is partial disability because the employee is not to lose 100% of his/her working capacity because of the said injury. Nevertheless, it is permanent injury because it will remain with him/her through out his/her lifetime.

The law has regulated these different scenarios differently. For the purpose of the labour Proclamation, temporary disability is a reduction in working capacity that may last for a maximum duration of twelve months starting from the date of the occurrence of the injury. It is interesting to note that the FCSP does not have fixed time limit for temporary

disability except that it is fully paid. Be that as it may, for this kind of injury, the employer, in addition to covering the medical expenses of the employee, is also obligated to make payment to such an employee. The mode of payment is a periodical payment and the amount will be full wage for the first three months; 75% of the employee's monthly wage for each of the next three months; and 50% of the monthly wage for each of the remaining six months.

For instance, let us assume an employee who was earning Birr600/month sustained temporary disability which lasted for eight months. His disability payment will be Birr600/month for the first three months; Birr 450/month for the next three months and finally Birr300/month for the last six months. It is worth noting that such payment is exempted from income tax(Art.112 LP) Nevertheless, the employee may be denied of these payments if s/he fails to observe doctor's advice or behaves in a manner that prolonged his/her time of recovery.

In cases where the injury resulted in permanent disability, the employer will be obligated to provide lump sum compensation to the injured. The maximum payment available for an employee who suffers total permanent disability due to employment injury is a sum equal to five times of the employee's annual wage(Art.109(3)(a) LP). The employer's liability, therefore, is both limited and liquidated. If the injury sustained resulted in permanent but partial disablement, the above mentioned payment shall be calculated in proportion to the degree of the disability and reduced accordingly.

For instance, if an employee who was earning Birr600/month sustained ***total permanent disability,*** due to employment injury, his/her disability benefit will be:

600(monthly wage)*12(yearly wage*5(years)=Birr36,000

But, let us assume the employee who lost his right arm above was verified by a medical evidence to have lost 30% of his working capacity, and was earning Birr600/month prior to the accident; his disability benefit will be:

600*12*5*30/100(rate of disability) = Birr 12,000

As indicated in the case of temporary disability benefit, the permanent disability benefit is also exempted from tax. In connection with this, it is important to note that an employee will not be entitled to permanent disability benefit if s/he has already a pension scheme or an insurance scheme arranged in advance by the employer.
For instance, in public enterprises or the civil service sector, if an employee suffered permanent injury of serious nature, he/she will automatically be pensioned and thereby benefit from the government pension scheme. In such cases the employee will not be entitled from the compensation scheme as he cannot benefit from two sources for a single injury. The same principle applies where the employer arranged an insurance scheme for the benefit of the employee.

Finally, if an employee dies due to employment injury, the employer will be obliged to pay dependent's benefit to the dependents of the deceased. The amount of such payment will be the employee's five years wage to be paid in the form of lump sum. Furthermore, the employer will cover the funeral expenses for the deceased employee.
Who are the deceased's dependents? They are nominated by the law itself and these are:
-the employee's widow/widower;
-children of the deceased who are under the age of eighteen;
-any parent of the deceased who was being supported by the same.
From the above explanation, it is not all dependents of the deceased who will be entitled to the dependent's benefit. It is only the close relatives, nominated beneficiaries, of the deceased who will benefit. Although the widow/widower's benefit is automatic, the other beneficiaries have additional conditions attached to them in order to benefit. For example, the children of the deceased should have been under eighteen years of age at the time of the claim. In case of parents also, it must be shown that they were being supported by the deceased; if they had independent means of livelihood, they will not be beneficiaries of the dependent's payment.

Where the deceased left widow, children and parents behind, the dependent's benefit (i.e. the deceased's five years wage) shall be shared among them on the following basis:
Widow-50%

Children-10 %(each)

Parents-10 %(each)

—all non taxable.

Chapter V: Collective Bargaining & Collective Agreement

The preceding chapters have been allocated towards discussing issues related to individual employment relations. But there is also another important aspect of the employment relationship which is known as "collective employment relation". By "collective employment relation" what we mean is a relation of an employer or employers' associations with trade unions or a collectivity of trade unions.

There were times in labour history that formation of associations of employees was considered as conspiracy and hence criminal offence. Through passage of time and ever since the establishment of ILO as a world body, however, the right to form association has been one of the fundamental rights for both the employees and employers. As an expression of the importance attached to this issue various ILO instruments including the ILO Constitution have expressly stated it.

Conventions such as No.87 (i.e. Freedom of Association and Protection of the Right to Organize Convention, 1948) and No.98 (i.e. Right to Organize and Collective Bargaining Convention, 1949) are the most important instruments in this respect. These instruments, among other things, protect associations from external interference and prohibit anti union discrimination. However even long after the right to freedom of association was recognized, employers were requiring their employees to commit in their contracts not to form trade union or not join a trade union(yellow dog contracts).

Domestically, Ethiopia ratified these Conventions in 1963. Moreover the Revised Ethiopian Constitution of 1955 under Article provided that "*every Ethiopian subject has the right to engage in any occupation and to that end form an association"*. However it was with the coming into force of Proclamation No.210/1963 that detailed implementation procedures were provided. This proclamation gave an opportunity for both employers and employees to form their respective association free from the interference of each other and the government. The minimum number of membership to form workers' association was fixed to be fifty. Because of this high threshold, employees of small enterprise which employ below fifty workers were not beneficiaries

of this right. Their option was to resort to forming general trade union by joining hand with employees of another enterprise with similar activity.

With the assumption of state power by the military regime in Ethiopia, a new proclamation (i.e.Proc. No.64/1975) was adopted. This instrument brought down the minimum membership to form an association to twenty thereby providing workers wider opportunity to forming associations. It, however, failed to provide legal framework for employers to form associations.[38]

It was with the coming into effect of Proc. No.42/1993 that employers' associations regained clear legal framework of establishment. Now that the FDRE constitution grants "*every person has the right to freedom of association for any cause or purpose*" (Art.31), freedom of association is no longer at the mercy of the legislature or the executive organ. The right of labour to form association is also expressly stated by the Constitution (Art.42).

As regards to formation of association for civil servants however, the issue is not yet settled. The FDRE constitution provided that "…*government employees whose work compatibility allows for it and who are below a certain level of responsibility, have the right to form associations to improve their conditions of employment and economic well-being (Art.42 (1)*." It, however, further provided that "*government employees who enjoy the rights mentioned hereinabove shall be determined by law (Art.42 (1) (c))*. Even though such stipulation was stated under the Federal Constitution which was adopted in 1995, the anticipated law towards enabling government employees to form associations is not yet in existence.

As regards to the labour regime, however, under the existing laws, both employees and employers are entitled to form associations of their own choice with out interference from any corner. Not only the right to form association but also that the right to form more

[38] Denying employers from forming associations was in contravention of Convention No.87 to which Ethiopia has been a party since 1963.

than one association in an enterprise (i.e. the concept of plurality (diversity) of unions) has been incorporated into Ethiopian labour law since that adoption of Proc. No.377/2003. (***Please identify the relevant provisions of LP with respect to this principle***.)

It must be underlined that formation of association is not an end by itself. It is in view of defending and furthering the interests of the collectivity that association is mainly established. Thus the issue of collective bargaining and collective agreement are important concepts in unionization.

Once an association is formed, it should be registered before the relevant organ upon satisfying the requirements laid by law (Art.117&119 LP). Registration as envisaged by the law could take two forms; actual and default registration.

Actual registration occurs where the registering organ is provided with the necessary documents and found the documents adequate and legal after which it entered the registration (Art.118 (3) first sentence). Default registration, on its part, occurs when the registering organ upon being provided with the necessary documents failed to respond positively or negatively on the application for fifteen days from the date of receipt of the documents. Hence, in such circumstances silence amounts to acceptance (Art.118 (3) second sentence.). It is believed that the incorporation of the principle of default registration would encourage the registering organ to act quickly.

Problem for discussion

**** How can an association which is registered by default acquire its certificate of registration? (Please note that the law seems to imply that an association cannot lawfully act with out the Certificate (Art.118 (4)***)

* ***Do you agree with the contention that diversity of unions in an enterprise is to the disadvantage of the employees concerned?***

It has been indicated above that the present labour proclamation seems to recognize the principle of plurality of unions. If so will the employer be compelled to bargain with every union or is there a way out? I think there seems a way out. The law enshrined the

concept of the "most representative union" which will possess the power of being *an exclusive bargaining agent.*

(Herein below there is an exhaustive article on the ILO's principles on Collective bargaining and Collective agreements. It is hoped that it will provide readers with a better insight on the matter).

ILO principles concerning collective bargaining[39]

Bernard GERNIGON*, Alberto ODERO* and Haracio GUIDO*

Collective bargaining, as was only to be expected, has felt the impact of the major changes affecting the world over the past 25 years: the general acceptance of the market economy following the fall of the Berlin wall; the debate on the role and structure of the state; economic restructuring and globalization; the ready availability of efficient ways of fighting inflation; the growth of non-standard forms of work and temporary contracts; the ongoing process of political and social democratization; the growing autonomy of trade unions from political parties, and many other factors too numerous to mention.

All these factors have had a varied and significant impact on collective bargaining. The scope of collective bargaining in terms of the categories covered has diminished, owing to, *inter alia*, high levels of unemployment and the growth of the informal sector, of subcontracting and of the various forms of non-standard employment relationship (which make unionization more difficult); there has, however, been a certain tendency for collective bargaining to develop in the public sector. Collective bargaining has lost some of its margin for maneuver as a result of the successive economic crises and the subjection of national economic policy to processes of rationalization and economic integration and agreement with the Bretton Woods institutions.

The increasingly harsh competition brought about by technological innovation and globalization has led to a reduction in the influence exercised in many countries by

[39]International Labour Review, Vol.139 (2000), No.1 (Foot notes omitted.)

sectoral agreements and has given added importance to collective bargaining at the enterprise level (and at lower levels, such as the work unit, the factory or the workplace), strictly taking into account the criteria of productivity and output. Flexiblization and deregulation of work have thus encouraged the growth of collective bargaining at enterprise level.

At the same time, there has been an increasing need for bilateral and tripartite agreements at national level, since certain issues of collective interest cannot be treated in enterprise- or even branch-level bargaining, especially when a country displays significant regional or sectoral differences. The bilateral or tripartite pacts agreed in many countries have a scope reaching beyond conditions of work in the strict sense, given that they cover employment, vocational training, inflation and other social issues (see, for example, ILO, 1995a; and Hethy, 1995). These agreements enhance the prestige of collective bargaining, as they settle questions formerly covered at most by non-binding consultations between the social partners.

The ILO has carried out an enormous amount of standard-setting work during the 80 years of its existence as it has sought to promote social justice (see Valticos, 1996 and 1998), and one of its chief tasks has been to advance collective bargaining throughout the world. This task was already laid down in the Declaration of Philadelphia, 1994, part of the ILO Constitution, which stated "the solemn obligation of the International Labour Organization to further among the nations of the world programmes which will achieve … the effective recognition of the right to bargaining" (ILO, 1998a, pp. 23-24). This principle is embodied in the right to organize and collective bargaining Convention, No. 98, which was adopted five years later in 1949, and which since has achieved near-universal acceptance: as of January 2000, the number of member states having ratified it stood at 145, which demonstrates the force of the principles involved in the majority of countries.

More recently, in June 1998, the ILO took another step forward by adapting the Declaration on Fundamental Principles and Rights at work and its follow up (see

Kellerson, 1996). This states that "all members, even if they have not ratified the [fundamental] Conventions, have an obligation, arising from the very fact of membership in the organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those [fundamental] Conventions" (ILO, 1999a p. 51). These principles include the effective recognition of the right to collective bargaining, along with freedom of association and the elimination of forced or compulsory labour, the effective abolition of child labour and the elimination of discrimination in employment and occupation.

The framework within which collective bargaining must take place if it is to be viable and effective is based on the principle of the independence and autonomy of the parties and the free and voluntary nature of the negotiations; it requires the minimum possible level of interference by the public authorities in bipartite negotiations and gives primacy to employers and their organizations and workers' organization by representatives of workers, employers and governments.

History has shown that the principles contained within this framework have retained their validity ever since Convention No. 98 was adopted 50 years ago, despite subsequent radical changes in the world-which is why the present article seemed opportune.

The purpose of this article is to set out the ILO's principles of collective bargaining as they emerge from the various international standards adopted by the Organization and the comments made by its supervisory bodies (notably the Committee of Experts on the application of conventions and Recommendations and the Committee on Freedom of Association). The definition and purpose of collective bargaining, the workers and subjects covered will first be set out. Then follow the principles of voluntary negotiation and good faith, the intervention of the authorities and the particular case of the public service. Finally, a summary of the principles is presented

along with some final observations on the degree to which the right to collective bargaining is applied across the world.

Definition and purpose of collective bargaining

In the ILO's instruments, collective bargaining is deemed to be the activity or process leading up to the conclusion of a collective agreement. In Recommendation No. 91, paragraph 2, collective agreements are defined as:

> *All agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more representative workers' organizations, or, in the absence of such organizations, the representatives of the workers duly elected and authorized by them in accordance with national laws and regulations, on the other hand. (ILO, 1996b, p.656).*

The text goes on to state that collective agreements should bind the signatories thereto and those on whose behalf the agreement is concluded and that stipulations in such contracts of employment which are contrary to a collective agreement should be regarded as null and void and automatically replaced by the corresponding stipulations of the collective agreement. However, stipulations in contracts of employment which are more favorable to the workers than those prescribed by a collective agreement should not be regarded as contrary to the collective (ibid., paragraph 3, p. 657).

In 1951, Recommendation No. 91 set out the binding nature of collective agreements and their precedence over individual contracts of employment, while recognizing the stipulations of individual contracts of employment which are more favorable for workers.

On several occasions, the Committee on Freedom of Association has expressed its preference for collective agreements over individual employment contracts, objecting to equal status being given to the latter or to their being used to the detriment of

workers belonging to a union (see, for example, ILO, 1996a, para. 911; and ILO, 1997a, paras. 517-518).

Thus, in a case concerning the United Kingdom, the Committee on Freedom of Association indicated that avoiding a representative organization and entering into direct individual negotiation with employees is contrary to the promotion of collective bargaining (ILO, 1998e, Case no. 1952, para. 337). For its part, the Committee of Experts considers that granting primacy to individual agreements over collective agreements does not encourage and promote collective bargaining as required by Article 4 of Convention No. 98 (ILO, 1998c, p. 224).

Convention No.98 does not contain a definition of collective agreements, but outlines their fundamental aspects in article 4:

> *Measures appropriate to national conditions shall be taken … to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations with a view to the regulation of terms and conditions of employment by means of collective agreements (ILO, 1996b, p. 640).*

In the preparatory work for Convention No. 151 (1978) the interpretation of the term "negotiation" was accepted as being "any form of discussion, formal or informal, that was designed to reach agreement", the term "negotiation" being deemed preferable to "discussion", which did not emphasize the need to endeavour to secure agreements (ILO, 1978, paras. 64-65, p. 25/9).

Convention No. 154, adopted in 1981, defines collective bargaining in Article 2 as follows:

> *[T]he term "collective bargaining" extends to all negotiations which take place between an employer, a group of employers or one or more employers' organizations, on the one hand, and one or more workers' organizations, on the other, for: (a) determining working conditions and terms of employment;*

> *and/or (b) regulating relations between employers and workers; and/or (c) regulating relations between employers or their organizations and a workers' organization or workers' organizations (ILO, 1996d, p. 93).*

The ILO supervisory bodies have also stated that the parties to collective bargaining are entitled to choose, independently and without any interference from the authorities, the level at which the negotiation is to be conducted (central, sectoral or enterprise level), and that trade union federations and confederations should be able to conclude collective agreements (ILO, 1994a, para. 249; and ILO, 1996a, para. 783).

Subjects, parties, and issues in collective bargaining

ILO instruments, as explained above, clearly permit collective bargaining only with representatives of the workers concerned if there are no workers' organizations in the area in question (enterprise level or higher). This standard is set out in paragraph 2 of Recommendation No. 91 and is confirmed in Convention No. 135, which provides in Article 5 that "the existence of elected representatives is not used to undermine the position of the trade unions concerned or their representatives" (ILO, 1996c, p. 496); and in Convention No. 154, which also provides in article 3, paragraph 2, that "appropriate measures shall be taken, whenever necessary, to ensure that the existence of these[workers'] representatives is not used to undermine the position of the workers' organizations concerned" (ILO, 1996d, p. 93).

The preparatory work for the collective agreements Recommendation, 1951 (No. 91), shows that the possibility for representatives of workers to conclude collective agreements in the absence of one or various representative organizations of workers is envisaged in the recommendation, "taking into consideration the position of those countries in which trade union organizations have not yet reached a sufficient degree of development, and in order to enable the principles laid down in the Recommendation to be implemented in such countries" (ILO, 1951, p. 603)

The Committee on Freedom of Association maintained in one case that "direct settlements signed between an employer and a group of non-unionized workers, even when a union exists in the undertaking, does not promote collective bargaining as set out in article 4 of Convention No. 98" (ILO, 1996a, para. 790). Going into greater detail, in another case, the Committee on Freedom of Association stated that the possibility for staff delegates who represent 10 per cent of the workers to conclude collective agreements with an employer, even where one or more organizations of workers already exist, is not conductive to the development of collective bargaining in the sense of article 4 of Convention No. 98 (ibid., para. 788).

The Committee of Experts did not address these issues in its last general survey on freedom of association and collective bargaining of 1994 on Conventions No. 87 and No. 98 (ILO, 1994a), although it has done so in observations on the application in certain countries of the conventions on freedom of association and collective bargaining, in which it has expressed a similar point of view to that of the Committee of Freedom of Association with regard to collective agreements concluded with non-unionized grouped of workers (see, for example, the observation concerning Costa Rica, in ILO, 1993a, pp. 184-185; and in the ILO, 1994a, pp. 203-204).

It is important to emphasize that, for workers' organizations to be able to fulfill their purpose of "furthering and defending the interests of workers" through collective bargaining, they have to be independent and must be able to organize their activities without any interference by the public authorities which would restrict this right or impede the lawful exercise thereof (Convention No. 87, Articles 3 and 10, ILO, 1996b, pp. 528-529). Moreover, they must not be "under the control of employers or employers' organizations" (Convention No. 98, article 2, ibid., pp. 639-640)

In this respect, Convention No. 151 provides in Article 5 that "public employees' organizations shall enjoy complete independence from public authorities" (ILO, 1996d, p. 49), while Recommendation No. 91 indicates in paragraph 2 that "nothing in the present definition [of collective agreements] should be interpreted as implying

the recognition of any association of workers established, dominated or financed by employers or their representatives" (ILO, 1996b, p. 656).

The requirement of a certain level of representativeness

Another issue which needs to be examined is whether the right to negotiate is subject to a certain level of representativeness. In this respect, it should be recalled, depending on the individual system of collective bargaining, that trade union organization which participate in collective bargaining may represent only their own members or all the workers in the negotiating unit concerned. In this latter case, where a trade union (or, as appropriate, trade unions) represents the majority of the workers, or a high percentage established by law which does not imply such a majority, in many countries it enjoys the right to be the exclusive bargaining agent on behalf of all the workers in the bargaining unit.

The position of the Committee of Experts is that both systems are compatible with the Convention (ILO, 1994a, paras. 238-242). In a case concerning Bulgaria, when examining the question raised by the complainant organization that some collective agreements apply only to the parties to the agreement and their members and not to all workers, the Committee on Freedom of Association considered that "this is a legitimate option – just as the contrary would be – which does not appear to violate the principles of freedom of association, and one which is practiced in many countries" (ILO, 1996e, Case no. 1765, para. 100). The Committee of Experts has stated that:

[W]hen national legislation provides for a compulsory procedure for recognizing unions as exclusive bargaining agents [representing all the workers, and not just their members], certain safeguards should be attached, such as: (a) the certification to be made by an independent body; (b) the representative organization to be chosen by a majority vote of the employees in the unit concerned; (c) the right of an organization, which in a previous trade union election failed to secure a sufficiently large number of votes, to request a new election after a stipulated period;

(d) the right of any new organization other than the certified organization to demand a new election after a reasonable period has elapsed.

[I]f no union covers more than 50 per cent of the workers, collective bargaining rights should be granted to all unions in this unit, at least on behalf of their own members (ILO, 1994a, paras. 240-241).

The Committee on Freedom of Association has upheld principles and decisions and decisions along the same line as the Committee of Experts (ILO, 1996a, paras. 831-842), and has justified that decisions concerning the most representative union should be made "by virtue of objective and pre-established criteria so as to avoid any opportunities for partiality or abuse (ibid., para. 827).

Recommendation No. 163 enumerates various measures designed to promote collective bargaining, including the recognition of representative employers' and workers' organizations (ILO, 1996d, p. 97, paragraph 3).

Workers covered by collective bargaining

Convention No. 98 (in Articles 4-6) establishes the relationship between collective bargaining and the conclusion of collective agreements for the regulation of terms and conditions of employment. It provides that "the extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations", and also states that "this Convention does not deal with the position of public servants engaged in the administration of the state, nor shall it be construed as prejudicing their rights or status in any way" (ILO, 1996b, p. 640). Under this Convention, only the armed forces, the police and the above category of public servants may therefore be excluded from the right to collective bargaining. With regard to this type of public servants, the Committee of Experts has stated the following:

The Committee could not allow the exclusion from the terms of the Convention of large categories of workers employed by the state merely on the grounds that they are formally placed on the same footing as public officials engaged in the administration of the state. The distinction must therefore be drawn between, on the one hand, public servants who by their functions are directly employed in the administration of the state (for example, in some countries, civil servants employed in government ministries and other comparable bodies, as well as ancillary staff) who may be excluded from the scope of the Convention and, on the other hand, all other persons employed by the government, by public enterprises or by autonomous public institutions, who should benefit from the guarantees provided for in the Convention (ILO, 1994a, para. 200).

The Committee on Freedom of Association has made statements in the same vein (ILO, 1996a, paras. 793-795 and 798).

Subjects covered by collective bargaining

Conventions No. 98, No. 151 and No. 154 and Recommendation No. 91 focus the content of collective bargaining on terms and conditions of work and employment and on the regulation of the relations between employers and workers and between organizations of employers and of workers.

The concept of working conditions used by the supervisory bodies is not limited to traditional working conditions (working time, overtime, rest periods, wages, etc.), but also covers "certain matters which are normally included in conditions of employment", such as promotions, transfers, dismissal without notice, etc. (ILO, 1994a, para. 250 including footnote 17). This trend is in line with the modern tendency in industrialized countries to recognize "managerial" collective bargaining concerning procedures to resolve problems, such as staff reductions, changes in working hours and other matters which go beyond terms of employment in their strict sense.

According to the Committee of Experts, "it would be contrary to the principles of Convention No. 98 to exclude from collective bargaining certain issues such as those relating to conditions of employment" and "measures taken unilaterally by the authorities to restrict the scope of negotiable issues are often incompatible with the Convention" (ibid., paras. 265 and 250, respectively).

Nevertheless, although the range of subjects which can be negotiated and their content is very broad, they are not absolute and need to be clearly related to conditions of work and employment or, in other words, matters which are primarily or essentially questions relating to conditions of employment (ILO, 1996a, para. 812). Moreover, the supervisory bodies allow the exclusion from the subjects covered by negotiation of matters which are for the employer to assignment of duties and appointments (ILO, 1998c, p. 259). They also allow the prohibition of certain clauses, such as discriminatory clauses, clauses of trade union security, or clauses which are contrary to the minimum standards of protection set out in the law.

The Committee on Freedom of Association has indicated that certain matters can also reasonably be regarded as outside the scope of negotiation, such as "matters which clearly appertain primarily or essentially to the management and operation of government business" (ILO, 1996a, para. 812). In a recent case against the government of Canada (Ontario), the Committee on Freedom of Association noted that:

Determining the broad lines of educational policy has been given as an example of a matter that can be excluded from collective bargaining; ... However, [the Committee indicated that] policy decisions may have important consequences on conditions of employment, which should be the subject of free collective bargaining (ILO, 1998b, case No. 1951, para. 220).

Governing principles

The principle of free and voluntary negotiation

The voluntary nature of collective bargaining is explicitly laid down in Article 4 of Convention No. 98 and, according to the Committee on Freedom of Association, is "a fundamental aspect of the principles of freedom of association" (ILO, 1996a, para. 844). Thus, the obligation to promote collective bargaining excludes recourse to measures of compulsion.

During the preparatory work for Convention No. 154, the Committee on Collective Bargaining agreed upon an interpretation of the term "promotion" (of collective bargaining) in the sense that it "should not be capable of being interpreted in a matter suggesting an obligation for the state to intervene to impose collective bargaining", thereby allaying the fear expressed by the Employer members that the text of the Convention could imply the obligation for the state to take compulsory measures (ILO, 1981, p. 22/6).

The Committee on Freedom of Association, following this line of reasoning, has stated that nothing in article 4 of Convention No. 98 places a duty on a government to enforce collective bargaining with a given organization by compulsory means, and that such an intervention by a government would clearly alter the nature of bargaining (ILO, 1996a, para. 846).

It cannot therefore be deducted from the ILO's Conventions on collective bargaining that there is a formal obligation to negotiate or to achieve a result (an agreement). Nevertheless, the supervisory bodies have considered that the criteria established by law should enable the most representative organizations to take part in collective bargaining (ILO, 1994a, para. 245), which implies the recognition or the duty to recognize such organization. Moreover, the Committee of Experts, when examining the application of Convention No. 98, has not criticized the prohibition of certain unfair labour practices in the process of negotiation likely to hinder the development of collective bargaining (ibid. para. 246). Similarly, the principles of the supervisory

bodies emphasize that the machinery which supports bargaining (the provision of information, consultation, mediation, arbitration) should be of a voluntary nature, in spite of which many national legislations oblige the parties to follow fixed procedures setting out all the stages and phases of the negotiation process, and under which there are frequent and compulsory interventions by the administrative authorities with predetermined time limits.

However, in practice, the supervisory bodies have accepted the imposition of certain sanctions in the event of conduct which is contrary to good faith or which constitutes unfair practice in the course of collective bargaining, provided that they are not disproportionate, and have admitted conciliation and mediation imposed by law within reasonable time limits. These criteria have undoubtedly taken into account of promoting collective bargaining in situations in which the trade union movement is not sufficiently developed. They have also taken account of the underlying concern in much legislation to avoid unnecessary strikes and precarious and tense situations resulting from the failure to renew collective agreements, particularly where they cover extensive categories of workers.

Free choice of bargaining level

In this respect, Recommendation No. 163 provides that "measures adapted to national conditions should be taken, if necessary, so that collective bargaining is possible at any level whatsoever, including that of the establishment, then undertaking, the branch of activity, the industry, or the regional or national levels" (ILO, 1996d, pp. 97-98, paragraph 4).

Similarly, the Committee of Experts, after recalling that the right to bargain collectively should also be granted to federations and confederations, and rejecting any prohibition of the exercise of this right, has stated that:

[L]egislation which makes it compulsory for collective bargaining to take place at a higher level (sector, branch of activity, etc.) also raises problems of compatibility

with the partners themselves, since they are in the best position to decide the most appropriate bargaining level, including, if they so wish, by adopting a mixed system of framework agreements supplemented by local or enterprise level agreements (ILO, 1994a, para, 249).

The Committee on Freedom on Association has developed this point further along the following lines:

According to the principle of free and voluntary collective bargaining embodied in Article 4 of Convention No. 98, the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and, consequently, the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case-law of the administrative authority or by the case-law of the administrative labour authority.

... Thus, the Committee does not consider the refusal by employers to bargain at a particular level as an infringement of freedom of association. Legislation should not constitute an obstacle to collective bargaining at the industry industry level (ILO, 1996a, paras. 851-853).

In this respect, the Committee considers that the requirement of the majority of not only the number of workers, but also of enterprises, in order to be able to conclude a collective agreement on the branch or occupational level could raise problems with regard to the application of Convention No. 98 (ibid., para. 854; and ILO, 1997a, para. 553). The Committee of Experts shares this view (ILO, 1996g, p. 215). Furthermore, it should be sufficient for the trade union at the branch level to establish that it is sufficiently representative at the enterprise level (ILO, 1996h, Case No. 1845 (Peru), para. 516).

As regards the principle that the parties involved decide by mutual agreement the level at which bargaining should take place, the Committee has noted that, in many countries, this question is determined by a body that is independent of the parties

themselves. The Committee considers that in such cases the body concerned should be "truly independent" (ILO, 1996a, para. 855).

The supervisory bodies have not established criteria concerning the relationship between collective agreements at the different levels (which may address the economy in general, a sector or industry, an enterprise or group of enterprises, or an establishment or factory); and which may, according to the individual case, have a different geographical scope. In principle, this should depend on the wishes of the parties. In practice, the supervisory bodies accept systems in which it is left to collective agreements to determine how they are to be coordinated (for example, by establishing that a person resolved in one agreement cannot be decided upon at other levels), as well as systems in which legal provisions distribute subjects between collective agreements, give primary to a specific level, adopt the criteria of the standards which are the most favorable to the workers, or which do not establish criteria and leave these questions to practical application. Recommendation No. 163 indicates in Paragraph 4 that "in countries where collective bargaining takes place at several levels, the parties to negotiations should seek to ensure that there is co-ordination among these levels" (ILO, 1996d, p. 98).

The principle of good faith

In the preparatory work for Convention No. 154, it was recognized that collective bargaining could only function effectively if it was conducted in good faith by both parties; but as good faith cannot be imposed by law, it "could only be achieved as a result of the voluntary and persistent efforts of both parties" (ILO, 1981, p. 22/11).

The Committee on Freedom and Association, in addition to drawing attention to the importance that it attaches to the obligation to negotiate in good faith, has stated that the principle of good faith implies making every effort to reach an agreement, conducting genuine and constructive negotiations, avoiding unjustified delays, complying with the agreements which are concluded and applying them in good faith; to this may be added the recognition of representative trade union organizations (ILO, 1996a, paras. 814-818; and ILO, 1997c, case No. 1919 (Spain), para. 325). The principle of the mutual respect for commitments entered into in collective agreements

is explicitly recognized in Recommendation No. 91, which provides that "collective agreements should bind the signatories thereto and those on whose behalf the agreement is concluded" (ILO, 1996b, p. 657, paragraph 3).

For its part, the Committee of Experts has stated that:

In several countries legislation makes the employer liable to sanctions if he refuses to recognize the representative trade union, an attitude which is sometimes considered as an unfair labor practice. The Committee recalls in this connection the importance which it attaches to the principle that employers and trade unions should negotiate in good faith and endeavor to reach an agreement, the more so in the public sector or essential services where trade unions are not allowed strike action (ILO, 1994a, para. 243).

Voluntary procedures and compulsory arbitration

The role of machinery to facilitate negotiations

According to the Committee of Experts, the existing machinery and procedures should be designed to facilitate bargaining between the two sides, leaving them free to reach their own settlement (ILO, 1994a, para. 248). The Committee on Freedom of Association has established the following:

The bodies appointed for the settlement of disputes between the parties to collective bargaining should be independent, and recourse to these bodies should be on a voluntary basis.

Certain rules and practices can facilitate negotiations and help to promote collective bargaining and various arrangements may facilitate the parties' access to certain information concerning, for example, the economic position of their bargaining unit, wages and working conditions in closely related units, or the general economic situation; however, all legislation establishing machinery and procedures for arbitration and conciliation designed to facilitate bargaining between both sides of industry must guarantee the autonomy of parties to collective bargaining (ILO, 1996a, paras. 858-859).

The supervisory bodies admit conciliation and mediation which are voluntary or imposed by law, if they are within reasonable time limits (ibid., paras. 502-504) – as well as voluntary arbitration – in accordance with the provisions to Recommendation No. 92 which indicates that: "Provision should be made to enable the procedure to be set in motion, either on the initiative of any of the parties to the dispute *or ex officio* by the voluntary conciliation authority" (ILO, 1996b, p.659, paragraph 3).

Compulsory arbitration

One of the most radical forms of intervention by the authorities in collective bargaining, directly under the terms of the law or as a result of an administrative decision, is the imposition of compulsory arbitration when the parties do not reach agreement, or when a certain number of days of strike action have elapsed. Compulsory arbitration may also be sought by one of the parties, but always conflicts with the voluntary nature of negotiation, since the solution which is imposed is not derived from the will of both parties, but from a third party to whom they have not had recourse jointly.

The supervisory bodies admit recourse to compulsory arbitration at the initiative of the authorities, or of one of the parties, or *ex officio* by law in the event of an acute national crisis, in the case of dispute in the public service involving public servants exercising authority in the name of the State (who can be excluded from the right to collective bargaining under Convention No. 98) or in essential services in the strict sense of the term, namely, those services whose interruption would endanger the life, personal safety or health of the whole or part of the population (ILO, 1996a, paras. 515 and 860-863). Evidently, compulsory arbitration is also acceptable where it is provided for in the collective agreement as a mechanism for the settlement of disputes. It is also acceptable, as the Committee on Freedom of Association, following the Committee of Experts, has recently indicated in cases where, after protracted and fruitless negotiations, it is obvious that the deadlock in bargaining will not be broken without some initiative on the part of the authorities (ILO, 1995c, Case No. 1768 (Iceland), para. 109).

Intervention by the authorities

In the ILO's Conventions on collective bargaining, there are no provisions covering possible conflicts between the specific interests of the parties and the general interest of the population. This omission was deliberate, and not a result of negligence (ILO, 1981, para. 64, p. 22/8). In practice, in situations of extremely serious economic crisis (such as situations of war or in the subsequent periods of economic reconstruction) or in order to combat inflation, achieve a balance of payments or combat unemployment or other economic objectives, governments have resorted to restrictive policies on wages and incomes. These have been implemented through measures to freeze wages or confine wage rises to certain limits, and have also often included mechanisms requiring the approval, modification or annulment of collective agreements that are in force. A freeze is often also imposed in prices and in guaranteed minimum wage levels which affects low-paid workers. The measures taken to pursue these policies may or may not have been adopted with the agreement of employers' and workers' organizations, which are sometimes consulted or included in commissions responsible for developing the policies (see ILO, 1974).

As will be seen below, the limitations implied by such adjustment policies are not acceptable in the view of the supervisory bodies in cases where they change the content of collective agreements which have already been concluded. However, they are admissible when they are imposed on future negotiations, provided that the situation is urgent and a series of guarantees are secured, which are enumerated below. The various types of intervention by the authorities in collective bargaining are covered below. Depending on the case, these may be adopted for technical, legal or economic reasons.

Drafting and registration of collective agreements

In the opinion of the Committee on Freedom of Association, intervention by the public authorities in the drafting of collective agreements is not compatible with the spirit of Article 4 of Convention No. 98, unless it consists exclusively of technical aid (ILO, 1996a, para. 866).

According to the supervisory bodies, refusal to approve a collective agreement is permitted only on grounds of errors of pure form or procedural flaws (ibid., para. 868), or where the collective agreement does not conform to the minimum standards laid down by general labour legislation (ILO, 1994a, para. 251). However, legislative provisions are not compatible with Convention No. 98 where they permit the refusal to register or approve a collective agreement on grounds such as incompatibility with the general or economic policy of the government or official directives on wages or conditions of work; a situation which requires prior approval of collective agreements by the authorities amounts to a violation of the principle of the autonomy of the parties to negotiate (ILO, 1996a, paras. 868-869; and ILO, 1994a, para. 251).

Nevertheless, for reason of general interest, governments establish mechanisms so that the parties take into account considerations relating to their economic and social policy and the protection of the general interest. Both the Committee of Experts and the Committee of Freedom of Association accept these mechanisms, provided that they are not of a compulsory nature. The Committee of Experts has indicated that:

The public authorities could also envisage a procedure to draw the attention of the parties in certain cases to considerations of general interest that might call for further examination by them of proposed agreements, provided, however, that preference is always given to persuasion rather than coercion (ILO, 1994a, para. 253).

The Committee on Freedom of Association has stated that if the public authority considers that the terms of the imposed agreements are clearly contrary to the economic policy objectives recognized as being in the public interest, the case could be submitted for advice and recommendation to an appropriate consultative body, provided, however, that the final decisions would rest with the parties (ILO, 1996a, para. 872).

However, these considerations must not be confused with stabilization policies which result in significant and generalized restrictions on future wage negotiations, which will be specifically examined in a separate section below.

Interference in the application of collective agreements in force

When the outcome of collective bargaining is restricted or annulled by law or by decision of the Administrative authorities, industrial relations are destabilized and workers lose their confidence in their trade union organizations, particularly when this type of intervention implies wage restrictions. These interventions violate the principle of free and voluntary negotiation of agreements and take various forms, which have been strongly refuted by the Committee on Freedom of Association. These are: the suspension, interruption, annulment or forced renegotiation of the agreement, by law or by decree, without the consent of both parties (ILO, 1996a, paras. 875-880).

The compulsory extension of the validity of collective agreements by law, particularly where this occurs following previous government interventions, is only admissible in cases of emergency and for brief periods of time, since such measures amount to interference with free collective bargaining (ibid, para. 881).

Restrictions on future negotiations

The Committee of Experts has noted that, in the belief that the national economic situation requires stabilization measures, an increasing number of governments have taken steps to restrict or prevent the free fixing of wages by means of collective bargaining. In this respect, the Committee of Experts has established the following basic principle.

[I]f, under an economic stabilization or structural adjustment policy, that is for imperative reasons of national economic interest, wage rates cannot be fixed freely by means of collective bargaining, these restrictions should be applied as an exceptional measure and only to the extent necessary, should not exceed a reasonable period and should be accompanied by adequate safeguards to protect effectively the standard of living of the workers concerned, in particular those who are likely to be the most affected (ILO, 1994a, para. 260).

The Committee on Freedom of Association has expressed itself in very similar terms and has added that, in any case, any limitation on collective bargaining by the authorities should be preceded by consultations with the workers' and employers' organizations in an effort to obtain their agreement (ILO, 1996a, paras. 882-884).

The Committee has indicated that the basic principle with regard to wage restrictions in the context of stabilization policies and the required guarantees are also applicable in cases in which the law obliges future collective agreements to respect productivity criteria, or the negotiation of wage increases beyond the level of the increase in the cost of leaving (ibid., paras. 890-892).

With regard to the duration of restrictions on collective bargaining, the Committee has considered that a three-year period of limited collective bargaining on remuneration within the context of a policy of economic stabilization constitutes a substantial restriction, and the legislation in question should cease producing effects at the latest at the dates mentioned in the legislation, or indeed earlier if the fiscal and economic situation improves (ibid., para. 886). Similarly, where wage restraint measures are taken by a government to impose financial controls, care should be taken to ensure that collective bargaining on non-monetary matters can be pursued (ibid, para. 888).

Collective bargaining in the public service

The exercise of the right of freedom of association by organizations of public officials and employees is now a reality in industrialized countries and in many developing countries. Convention No. 98, adopted in 1949, excluded from its scope public servants engaged in the administration of the state, but requiring States to promote machinery for negotiation or such other methods as allow representatives of public employees to participate in the determination of their terms and conditions of employment. According to Article 1, the only categories which can be excluded (apart form the armed forces and the police, as in previous Conventions) are "high level employees whose functions are normally considered as policy making or

managerial" and "employees whose duties are of a highly confidential nature" (ILO, 1996d, p. 48).

A few years later, in 1981, came the adoption of Convention No. 154, which promotes collective bargaining in both the private sector and the public service (with the exception of the armed forces and the police) and only allows, for the public service, the fixing of special modalities of application of the Convention by national laws or regulations or national practice (ibid., article 1, p. 93). A state which ratifies the Convention cannot confine itself to consultations, but has to promote collective bargaining with the aim, inter alia, of determining working conditions and terms of employment. It should be pointed out, as a matter of interest which facilitated the inclusion of the public service that, in contrast with Convention No. 98, Convention No. 154 no longer refers to the determination of terms and conditions of employment by means of formal collective agreements (which in many countries have force of law, whilst in certain countries ordinary agreement between parties are not even legally binding). Such a provision would have made it impossible for this right to be included, in view of the objections of the states which were prepared to recognize collective bargaining in the public service, but without renouncing at the same time a statutory system; see von potobsky, 1988, p. 1890).

Characteristics of collective bargaining in the public service

Collective bargaining in the public service raises specific problems. On the one hand, there are often one or more national conditions of service designed to achieve uniformity, which are in general approved by Parliament, and which often contain exhaustive regulations covering the right, duties and conditions of public servants, thereby prohibiting or leaving little room for negotiation. On the other hand, the remuneration of public servants has financial implications which have to be reflected in public budgets, which are approved by such bodies as parliaments and municipalities, etc. These bodies are not always the employers of public servants and their decisions have to take into account the economic situation of the country and the general interest. Associations which participate in negotiations in the public service are therefore very frequently subject to directives or the control of external bodies, such as the Ministry of Finance or an interministerial committee. Moreover, the

period of duration of collective agreements in the public sector does not always coincide with the duration of budgetary laws – a situation which can give rise to difficulties.

These problems are compounded by other difficulties, such as the determination of the subjects for negotiation and their distribution between the various levels within the complex territorial and operational structure of the State, as well as the determination of the negotiating parties at these levels.

This explains why, according to Convention No. 151 and No. 154, it is admissible for special modalities of application to be fixed for collective bargaining in the public service. The Committee of Experts has not yet carried out a general survey on this subject and the principles set out by the ILO's supervisory bodies have focused mainly on budgetary matters and interventions by the authorities in freely concluded agreements. The question arises as to whether these specific modalities include: (a) the harmonization of an agreed system with a statutory system (von potobsky, 1988, pp. 1888-1889, 1892); (b) the execution from bargaining of certain subjects; (c) the centralization of negotiation on subjects with budgetary implications or which would imply changes in the laws governing the conditions of service of public servants; or (d) the possibility that the legislative authority should determine certain directives, preceded by discussions with the trade union organizations, within which each exercise of collective bargaining on issues relating to remuneration or other matters with financial implications must remain. The answer to these questions is likely to be affirmative, given that the Conventions in question allow a certain amount of flexibility.

In the opinion of the Committee of Experts, the following are compatible with the Conventions on collective bargaining;

[L]egislative provisions which allow Parliament or the competent budgetary authority to set upper and lower limits for wage negotiations or to establish an overall "budgetary package" within which the parties may negotiate monetary or standard-setting clauses (for example: reduction of working hours or other arrangements, varying wage increases according to levels of remuneration, fixing a

timetable for read adjustment provisions) or those which give the financial authorities the right to participate in collective bargaining alongside the direct employer are compatible with the Convention, provided they leave a significant role to collective bargaining. It is essential, however, that workers and their organizations be able to participate fully and meaningfully in designing this overall bargaining framework, which implies in particular that they must have access to all the financial, budgetary and other data enabling them to assess the situation on the basis of the facts (ILO, 1994a, para. 263).

This is not the case of legislative provisions which, on the grounds of the economic situation of a country, impose unilaterally, for example, a specific percentage increase and rule out any possibility of bargaining, in particular by prohibiting the exercise of means of pressure subject to the application of severe sanctions (ILO, 1993b, case No. 1617 (Ecuador), para. 63). In this respect, during periods of prolonged and widespread economic stagnation the Committee considers that the authorities should give preference as far as possible to collective bargaining in determining the conditions of employment of public servants; where the circumstance rule this out, measures of this kind should be limited in time and protect the standard of living of the workers who are the most affected (ILO, 1994a, para. 264).

This point of view has been shared by the Committee on Freedom of Association (ILO, 1996a, para. 899), which has also emphasized that "the reservation of budgetary powers to the legislative authority should not have the effect of preventing compliance with collective agreements entered into by, or on behalf of, that authority" (ibid., para. 894).

Like the Committee of Experts, the Committee on Freedom of Association has considered that:

In so far as the income of public enterprises and bodies depends on state budgets, it would be objectionable – after wide discussion and consultation between the concerned employers' and employees' organizations in a system having the confidence of the parties – for wage ceilings to be fixed in state budgetary laws, and neither would it be a matter for criticism that the Ministry of Finance prepare a

report prior to the commencement of collective bargaining with a view to ensuring respect of such ceilings (ibid., para. 896).

Before such ceilings are established, both the employers and the public sector trade union organizations should be consulted and be able to express their points of view to the authority responsible for assessing the financial consequences of draft collective agreements. Nevertheless, "notwithstanding any opinion submitted by the financial authorities, the parties to collective bargaining should be able to conclude an agreement freely" (ibid., para. 897).

On the subject of the provisions of collective agreements relating to remuneration and conditions of employment which have financial implication, one of the fundamental principles mentioned above is that collective agreements must be respected by the legislative and administrative authorities. This principle is compatible with the various budgetary systems, provided that they meet certain conditions and, in particular, can accommodate, on the one hand, systems in which collective agreements resulting from negotiations are concluded before the budgetary debate (provided that the budgets in practice respect the content of the agreements) and, on the other hand, systems in which the agreements are concluded after the budget provided they are sufficiently flexible. Such budgetary flexibility can be achieved in a number of ways: by permitting an internal adjustment of the budgetary items to give effect to collective agreements; by allowing the transfer of future budgets of the debt resulting from unforeseen expenditure derived from collective agreements in the public service; by permitting the budget to be changed in subsequent additional laws which allow compliance with the collective agreements; or, if there is significant latitude for negotiation, by determining, maximum levels of remuneration in terms of percentage increase or the overall wage mass, after taking into account in good faith the outcome of significant prior consultations with trade union organizations.

Finally, the flexibility permitted by Convention No. 154 means that, when negotiation covers terms and conditions of employment which involve changes in the legislation respecting administrative careers or the conditions of service of public employees, its results cant take the form of a commitment by the government authorities to submit draft legislation to parliament to amend the above texts along the lines of the negotiations (see ILO, 1995c, Case No. 1561 (Spain), para. 50).

Summary of ILO principles on the right to collective bargaining

The standards and principles emerging from the ILO's Conventions, Recommendations and other instruments on the right to collective bargaining, and the principles set forth by the Committee of Experts and the Committee on Freedom of Association on the basis of these instruments may be summarized as follows:

A. The right to collective bargaining is a fundamental right endorsed by the members of the ILO in joining the organization, which they have an obligation to respect, to promote and to realize, in good faith (ILO Declaration on Fundamental principles and rights at work and its follow-up)
B. Collective bargaining is a right of employers and their organizations, on the one hand, and organizations of workers, on the other hand (first-level trade unions, federations and confederations); only in the absence of these latter organizations may representatives of the workers concerned conclude collective agreements.
C. The right to collective bargaining should be recognized throughout the private and public sectors, and it is only the armed forces, the police and public servants engaged in the administration of the state who may be excluded from the exercise thereof (Convention No. 98).
D. The purpose of collective bargaining is the regulation of terms and conditions of employment, in a broad sense, and the relations between the parties.
E. Collective agreements should be binding. It must be possible to determine terms and conditions of employment which are more favorable than those established by law and preference must not be given to individual contracts

over collective agreements, except where more favorable provisions are contained in individual contracts.

F. To be effective, the exercise of the right to collective bargaining requires that workers' organizations are independent and not "under the control of employers or employers' organizations" and that the process of collective bargaining can proceed without undue interference by the authorities.

G. A trade union which represents the majority or a high percentage of the workers in a bargaining unit may enjoy preferential or exclusive bargaining rights. However, in cases where no trade union fulfils these conditions or such exclusive rights are not recognized, workers' organizations should nevertheless be able to conclude a collective agreement on behalf of their own members.

H. The principle of good faith in collective bargaining implies recognizing representative organizations, endeavoring to reach an agreement, engaging in genuine and constructive negotiations, avoiding unjustified delays in negotiation and mutually respecting the commitments entered into, taking into account the results of negotiations in good faith.

I. In view of the fact that the voluntary nature of collective bargaining is a fundamental aspect of the principles of freedom of association, collective bargaining may not be imposed upon the parties and procedures to support bargaining must, in principle, take into account its voluntary nature; moreover, the level of bargaining must not be imposed unilaterally by law or by the authorities, and it must be possible for bargaining to take place at any level.

J. It is acceptable for conciliation and mediation to be imposed by law in the framework of the process of collective bargaining, provided that reasonable time limits are established. However, the imposition of compulsory arbitration in cases where the parties do not reach agreement is generally contrary to the principle of voluntary collective bargaining and is only admissible: (1) in essential services in the strict sense of term (those whose interruption would endanger the life, personal safety or health of the whole

or part of the population; (2) with regard to public servants engaged in the administration of the State; (3) where, after prolonged and fruitless negotiations, it is clear that the deadlock will not be overcome without an initiative by the authorities; and (4) in the event of an acute national crises. Arbitration which is accepted by both parties (voluntary arbitration) is always legitimate.

K. Interventions by the legislative or administrative authorities which have the effect of annulling or modifying the content of freely concluded collective agreements, including wage clauses, are contrary to the principle of voluntary collective bargaining. These interventions include: the suspension or derogation of collective agreements by decree without the agreement of the parties; the interruption of agreements which have already been negotiated; the requirement that freely concluded collective agreement be renegotiated; the annulment of collective agreements; and the forced renegotiation of agreement which are currently in force. Other types of intervention, such as the compulsory extension of the validity of collective agreements by law are only admissible in cases of emergency and for short periods.

L. Restrictions on the content of future collective agreements, particularly in relation to wages, which are imposed by the authorities as part of economic stabilization or structural adjustment policies for imperative reasons of economic interest, are admissible only in so far as such restrictions are preceded by consultations with the organizations of workers and employers and fulfill the following conditions: they are applied as an exceptional measure, and only to the extent necessary; do not exceed a reasonable period and are accompanied by adequate guarantees designed to protect effectively the standards of living of the workers concerned; and particularly those who are likely to be the most affected.

Final observations

The observations made by the Committee of Experts on the application of the Right to Organize and Collective Bargaining Convention, 1949 (No. 98), show that the

large majority of states which have ratified the Convention apply it in a satisfactory manner. This demonstrates that it is a right which enjoys almost universal recognition.

By way of example, it may be pointed out that in its 1998 and 1999 reports the Committee of Experts made critical observations on 47 out of the 145 governments which have ratified Convention No. 98 (ILO, 1998c, pp. 249-299; and ILO, 1999c, pp. 322-351).

The problems noted more frequently in the observations of the Committee of experts relate in particular to the denial of the right to collective bargaining, to public servants who are not engaged in the administration of the state, as well as the requirement for trade union organizations to represent too high a proportion of workers to be recognized or to engage in collective bargaining. Immediately afterwards comes the significant number of countries in which collective bargaining is subjected to the government's economic policy. Finally, certain countries exclude some subjects from collective bargaining, submit it to compulsory arbitration in certain cases, restrict the right of the parties to determine the level of bargaining, or prohibit collective bargaining by specific categories of workers in the private sector or of federations and confederations.

The near-universal endorsement of collective bargaining is due not only to the strength of the fundamental principles underlying it but also to its powers of adaptation. The contracting parties, that is, the employers and workers, are best placed to know their own aspirations and potential so that, in a bargaining process undertaken freely and in good faith, they can each make concessions, negotiate provisions satisfactory to all the parties involved, and arrive at mutually beneficial agreements. Thanks to its inherent nature, therefore, collective bargaining has been able to adapt to the major political and socio-economic changes outlined in the introduction. However, the impact of these changes, at the start of the year 2000, in no way diminishes the raison d'etre, significance or achievements of collective

bargaining, as proved by the very large network of collective agreements, at different levels and with a vast scope, to be found in many countries.

Will the picture be completed in the near future by the emergence of international collective bargaining within a context of multinational enterprises and regional economic integration? Up to now, the few instances of international collective bargaining have occurred only in certain transnational enterprises. It should be noted that Directive 94/45, adopted by the Council of Ministers in 1994, promotes consultation and collective bargaining in thousands of transnational enterprises and groups with headquarters or branches in the European Union (European Communities, 1994). The first European works councils within the framework of this directive have now been set up (see ILO, 1995d) and the social partners have also managed to conclude a number of European Union-wide agreements.

Though in recent years a radical view has been heard arguing for labor law to be abolished and replaced with civil and commercial laws, and though some legislations still place – sometimes severe– limits on collective bargaining, such ideas and practices are clearly only those of a minority and do not cast doubt on the ILO's principles on collective bargaining. On the contrary, as pointed out earlier, in the Declaration on Fundamental Principles and Rights at Work adopted by the ILO in 1998, the international community declared collective bargaining to be a fundamental right.

Problems for discussion

****To what extent are ILO principles concerning collective bargaining incorporated in the current Ethiopian labour legislation?***

**** Assume that representatives of the trade union and the employer agreed to bargain a collective agreement. Further assume that they drew up the procedure for discussion and as an item for such procedure it was stated that every discussion and points of agreement should be put in minutes. Minutes of the previous discussion were to be adopted at the commencement of the next day of the meeting. This procedure went***

smoothly as prescribed by the procedure. All items presented for bargaining were discussed and agreed. Nevertheless, when the representative of the employer was required to put her signature on the draft collective agreement she refused to do so stating that she had changed her mind in some of the items of the document. Should it be compelled to sign or would there be any other way out?

Chapter VI: Employment Dispute Settlement Mechanisms

This is the final chapter of this course and tries to highlight the mechanisms of employment dispute settlement. As employment relation is a unique relation, it requires unique dispute resolution arrangement. From the discussion of the preceding chapters, it has been pointed out that employment relation involves both individual and collective interactions. The disputes may also be reflections of such interactions.

Be that as it may, and no matter how clear and specific a law may be, there will always be disputes in its interpretation and application. Hence there seems a need to lay down in advance dispute settlement mechanisms so that disputes could be resolved accordingly if and when they arise.

The labour law and the Civil Service employment regimes follow different kinds of dispute settlement machineries. Even for the labour disputes alone, the organs of dispute settlement vary with the nature of the dispute.

Ordinarily, labour disputes are either individual or collective. The labour proclamation has employed an illustrative listings of what constitutes individual labour dispute and what constitutes a collective one (*refer Arts.138 (1) &142(1) respectively).* Due to lack of clarity with this approach, the Federal Supreme Court Cassation Bench was recently compelled to come up with binding interpretation in this respect[40] with a view to attaining uniform application of the law.

Determining whether a certain dispute is individual or collective is essential in deciding which organ has competence to entertain the case. Normally individual labour disputes are within the competence of the labour divisions of the ordinary woreda court while the collective ones are within the power of the Labour Relation Boards.

The composition and the working systems of the Labour Divisions and the Boards are significantly different. As regards to composition, the Labour Divisions are to be

[40] See, decisions of Cassation Bench, Vol.1 File No.18180

operated by sitting judges of the ordinary courts while the Boards are composed of representatives of the employers' and employees associations in addition to the appointees of the government(i.e. tripartite arrangement).

With respect to the working systems, the labour divisions are expected to conduct business in accordance with the stipulations of the civil procedure in their judicial proceedings. Winner- loser determination is the final outcome in such forum. Nevertheless, the Boards are expected to serve as more of negotiating forum rather than an adjudicating one. They are required to settle disputes before them in a manner acceptable to both of the disputing parties. Win-win solution is the predominant mode of settling disputes before the Boards. It is only when amicable settlement is not attained that the Boards will resort to judicial settlement. Thus judicial settlement before the Boards is the last resort. Submission of cases before Boards is free of charge to all parties while exemption of payment of court fee only applies to the employee and the employees' association when cases are submitted to labour divisions.

Decisions of the labour divisions are appealable to the upper floor in the judicial hierarchy and the decision of the appellate division is final irrespective of whether the appellate division affirms or reverses the decision of the lower court. With the same token, decisions of the Boards are appealable, *on issues of law only*, to the Federal High Court and the decision of this court is held final regardless of whether is agrees or disagrees with the Board's position. It is important to note, however, that the final decisions are both open to challenge before a Cassation Bench provided that fundamental error of law is shown to have been committed in the final decisions.

Exercise

Could you think of a situation where the employer may appear as a plaintiff before the Woreda court of the Labour Division? What about appearing as a plaintiff before Labour Relations Board?

Dispute settlement mechanism under the Civil Service employment regime is different from the labour one. As there is no legal framework enabling civil servants to form associations of their own, collective employment dispute under the civil service is unthinkable. Hence, it will be individual grievances which may express themselves in the form of individual complaints.

For this the Civil Service Proclamation has laid down mechanisms for grievance handling within the internal structure of every civil service office.[41] Accordingly, every government of is expected to establish a "Grievance Handling Committee" which shall conduct grievance inquiry submitted by civil servants, and propose recommendations as to how to resolve it to the head of the institution concerned. "Disciplinary Committees" are also expected to be established in view of investigating alleged misdeeds committed by civil servants and recommend proportional measure to the head of the government office concerned.

Furthermore, civil servants are entitled to lodge appeals from the decisions of the government organs to Administrative Tribunals.[42] An administrative tribunal is a bench composed of three judges to be appointed by the General Director of the Federal Civil Service Agency.[43] The administrative tribunal has a judicial power in the sense that it is empowered to confirm, reverse or amend the decision of the government office. The decision of the Administrative Tribunal is, *on issues of law only*, appealable to the Federal Supreme Court.

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[41] Art.72 of Proc. No.515/2007
[42] Ibid, Art.74
[43] Similar arrangement is to be undertaken by the Regional Civil Service Offices in their respective territory.

Labour Dispute Settlement process[*44]

I. Introduction[*]

As is clear from the first two recitals in its Preamble, the primary objective of the Labor Proclamation[45], *inter alia*, is maintaining industrial peace to help workers and employers work in the spirit of harmony and cooperation towards the all-round development of our country. At the same time, when and if disputes are bound to arise, it claims to have laid down the procedure for their expeditious settlement.

Thoroughly conducted assessment needs to be carried out to measure the efficacy of the disputes settlement methods already in place in the Labour Proclamation. Far from it, this limited work is aimed at addressing the various Alternative Dispute Resolution (ADR) methods and their legal effects as are used in the Labour Proclamation, and, thereby, show as to how labor disputes are settled at different levels. Attempt is also made to identify the salient distinguishing hallmarks of each of the dispute settlement methods in an attempt to popularize the legal frameworks of the available dispute settlement methods in the Ethiopian laws. The author humbly submits that this limited work is by no means exhaustive; it is rather aimed at triggering for in-depth discussions and furtherance of scholarly writings on the subject matter.

The Constitution of the Federal Democratic Republic of Ethiopia clearly puts it that the House of Peoples Representatives has the power to enact the Labour Code[46]. Thus, it is the Federal Government that has the legislative jurisdiction over labour matters in Ethiopia.

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[*] By Tecle Hagos Bahta LL.B (AAU), LL.M (Ghent University), Lecturer at Law, Formerly Director of MULF Legal Aid Center, Faculty of Law, Mekelle University.

[44] Bibliography omitted.

[*] **FOR EDUCATIONAL USE ONLY** (This is a Preliminary Draft of the same article soon to be published in the Jimma University, Faculty of Law, Journal of Contemporary Laws. Please, Do not Quote).

[45] Labor Proclamation no. 377/2003, Fed. Neg.Gaz., Year 10, no. 12, 2004 (hereinafter "The Labor Proclamation"). Also note that, unless otherwise indicated, all provisions cited hereunder refer to the Labor Proclamation.

[46] The Constitution of the Federal Democratic Republic of Ethiopia, 1995.

II. Determination of labour disputes and their settlement

Nevertheless, the adjudicative jurisdiction of labour disputes[47] does not seem to squarely favor the Federal Courts. The Labour Proclamation classifies labour disputes into individual and collective labour disputes and vests all individual labour disputes in the First Instance Courts of the States.[48] Thus, without losing sight of the fact that the Federal Courts, in principle, are empowered to adjudicate over **"…**cases arising under**"** Federal laws (i.e., Federal Question Jurisdiction), adjudicative jurisdiction, under the Proclamation, over individual labour disputes is specifically vested in State Courts.

Simply put the power to adjudicate over individual labour disputes are concurrently vested both in the Federal Courts and the State Courts. Thus, one cannot rule out the possibility that once the House of Peoples' Representatives, as empowered under Art.78 (2) of the Constitution of The Federal Democratic Republic of Ethiopia, establishes Federal First Instance Courts in one or more of the States, the aggrieved party will have the right to shopping the forum i.e., between the Federal First Instance Courts and the State First Instance Courts.

In the Federated states, therefore, the Proclamation establishes in each First Instance Courts of the States (a) labor division (s).[49] The Woreda Courts in many of the States seem to be the First Instance Courts. Labour divisions are also established in the State Appellate Courts to hear mostly appeals from decisions rendered by the First Instance Courts or by the Ministry of Labor and Social Affairs or Bureau of Labor and Social Affairs.[50] However, the power to adjudicate individual labour disputes arising in the Federal Enclave Cities- Addis Ababa and Dire Dawa – is vested in the Federal Courts.[51]

On the other hand, conciliation is made to come to the fore in settling collective labour disputes. The Conciliation proceeding could take place either with a neutral third party-

[47] Art. 136(3): "labor dispute" means any controversy arising between a worker and an employer or trade union and employers in respect of the application of law, collective agreement, work rules, employment contract or customary rules and also any disagreement arising during collective bargaining or in connection with collective agreement.
[48] Arts.137- 138
[49] Art. 137

[50] Art.139
[51] Federal Courts Establishment Proclamation No. 25/ 1996, Fed. Neg. Gaz., Year 2, No.13, 1996, Art. 14.

conciliator- assigned by the Ministry or Bureau or appointed by the disputing parties themselves.

The Proclamation defines "Conciliation" as:

…The activity conduced by a private person or persons appointed by the Ministry at the joint request of the parties for the purpose of bringing the parties together and seeking to arrange between them voluntary settlement of a labour dispute which their own efforts alone do not produce.[52]

At this juncture, mention of some points should be made in an attempt to dispel some confusion that may surface from the very definition itself. Firstly, the disputing parties involved in a labour dispute, as in any other dispute, will naturally try to settle their points of disagreement through a process of communication, in the absence of a third party, by mutually conceding [or 'taking and giving'] process of dispute settlement method-Negotiation. Thus, Negotiation can be defined as:

…a process leading to joint decision-making by the disputing parties themselves. It is an interactive process of information exchange and learning, leading ultimately to a decision accepted to both disputing parties.[53]

No doubt, having in mind the convenience, confidentiality, cost-effectiveness, continued business relationship, etc… for the parties, this is the most efficacious and advantageous means of settling disputes. Unfortunately, not all disputes are settled through negotiation.

Secondly, the question as to who appoints the 'private person or persons' mentioned in the definition deserves some treatment here. From the reading both of the English and Amharic versions of the provision, one can simply gather that the English version is misconceiving the message that the legislator has in mind. The correct translation of the text would, thus, read:

…by a private person or persons appointed by both parties jointly or the Ministry at the request of either of the parties…

This translation seems to reflect the intention of the legislator more correctly than what the afore-stated provision has to offer. This is because, firstly, Art. 143(1) clearly states

[52] Art. 136 (1)
[53] Amazu A. Asouzu, International Commercial Arbitration and African States: Practices, Participation and Institutional Development: Cambridge University Press, 2001, p.18.

that the parties can resort to conciliation or arbitration of their own choice other than the Ministry; secondly, the Proclamation, under Art.141 (1), imposes the obligation upon the Ministry or Bureau to assign a conciliator once a labour dispute is reported by either of the parties.

Thirdly, one would inquire whether the legislator, by the wording used to explain the activities of the conciliator, is opting for conciliation, in the strictest sense of it, or Mediation or both, as the best method of settling labour disputes. As far as this author's knowledge goes, codes and pieces of enactments in Ethiopia have been consistently using the word 'conciliation'. Thus, the use of the term 'mediation' as a dispute settlement method in the Ethiopian legislations is minimal, if not, non-existent. The wording

…Bringing the parties together and seeking to arrange between them voluntary settlement…

is precisely the wording used to define 'conciliation' in the Civil Code of Ethiopia.[54] To be sure, both terms are used in various legal documents, literatures, conventions, etc… either to mean the same thing or to convey different messages. It is true that Negotiation, Conciliation and Mediation are outside court dispute settlement methods in which an amicable settlement of dispute is sought for through compromise. Thus, compromises are made to achieve a settlement acceptable to both parties; there is no winner or loser. This process of 'giving and taking' ensures that parties are involved in jointly solving the problem for mutual gain rather than wining their positions. These processes are much opted, *inter alia*, for the 'win/win' situation rather than the 'winner-takes-all' outcome in the court of law. Both mediation and conciliation are characterized by the involvement of a neutral third party-mediator/ conciliator- who helps in facilitating the negotiation process between the disputing parties.

Some scholars argue that, despite the similarity between the two, conciliation and mediation can be treated as independent methods of dispute settlement. It is claimed that conciliation is *"… a less formal procedure than mediation or one in which the neutral third party is less active…will not generally make a recommendation as to the terms but*

[54] The Civil Code of Ethiopia, 1960, Art.3318 (1)

a mediator will go further and formulate his or her own recommendation on settlement terms".[55]

Others would reject this assertion. In the words of Amazu A. Asouzu, a famous writer on the area:

...The making of recommendations, which is said to be a feature of active participation by the mediator, is not unique to mediation. Whether or not a third party intervener will make a recommendation depends on the circumstances and is a question of degree and form. Skillful outsiders usually make recommendations only if the likelihood of acceptance is great.[56]

One would not be able to extrapolate the distinction of the two from the definition used in the Labour Proclamation nor can we from the provisions on Conciliation in the Civil Code of Ethiopia.[57] Thus, in the absence of clear hallmarks delineating the distinction of these methods in the Ethiopian legal system, it is proper to conclude that conciliation and mediation are the same method of dispute settlement though conciliation is preferred and thus consistently used.

The crucial question here is: Should all collective labour disputes undergo a compulsory conciliation, be it conduced by a conciliator appointed by the Ministry, Bureau or the parties themselves?

The question may seem a little bit of oddity, as conciliation is a consensus-oriented joint problem-solving process and does not seem to be compulsorily imposed on the parties to conciliate. However, this imposition is not peculiar in the legislative enactments as it is, for instance, applied in settling disputes arising out of cooperative societies under Art.46 *cum* 49 of the Cooperative Societies Proclamation No. 147/98.[58] Art. 46 provides thus:

The disputes provided under Art.49 of this Proclamation shall be heard by a third party appointed by the parties before they are referred to the arbitration.

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[55] Amazu A. Asouzu, Supra Note 9, pp. 19-20
[56] IBID
[57] The Civil Code of Ethiopia, 1960, Arts. 3318- 3324
[58] Federal Cooperative Societies Proclamation No. 147/ 1998, Fed.Neg. Gaz.,Year 5, No.27, 1998.

The afore-mentioned Provision makes it imperative that the disputing parties, involved in the designated disputes under the Proclamation, try to settle their disputes through Conciliation.

Why would the legislator make it compulsory, in spite of the fact that it can never be successful shorn of the disputing parties' volition to sit together, table all the playing cards, be willing to cooperate to 'give and take' so that a mutually shared interests but differing positions end up in mutual gains? In so doing, the *raison detre* seems to be encouraging the party initiating it by saving him from being seen by the other party as a weaker party. A close scrutiny over art.136 *cum* 141, however, does not favor the conclusion that all collective labour disputes must compulsorily undergo a try under the Conciliation proceedings. On the other hand, from the reading of Art.158 (2), it is given that the disputing parties, before initiating a strike or lockout partially or wholly, "… shall make all efforts to solve and settle their labor disputes through Conciliation**."** By virtue of Art.157(3) *cum* 136(2), neither the workers have the right to strike nor have the employers the right to lockout in the "Essential Public Service Undertakings"(hereinafter EPSU).[59] Thus, in those Undertakings that are Otherwise Categorized (hereinafter "UOC"), the right to strike and lockout are preserved and that conciliation is a *sine qua non* for it. In other words, the right to strike by Trade Unions or the right to Lockout by Employers, in the UOC, can be resorted to only if conciliation proceedings failed to bring about the desired outcome. The bottom line is, though, conciliation is offered, by the legislature, to serve as the appropriate collective labour disputes settlement method under the Labor Proclamation both in the EPSU and UOC.

In conciliation, therefore, parties will sit together, table all the playing cards, so to say, negotiate in good faith (Art.130(4)), mutually concede, and jointly expand the pie, finally leading them into a mutually agreed solution for the dispute.

The Conciliation proceedings will be regulated under Arts.3318-3324 of the Civil Code of Ethiopia. Thus, during the conciliation proceedings, in the event that the Conciliator draws up terms of compromise and the parties expressly undertake in writing to confirm

[59] Art. 136 (2): "essential public service undertakings" means those services rendered by undertakings to the general public and includes[are on the basis of the Amharic version] the following: (a) air transport; (b) undertakings supplying electric power; (c) undertakings supplying water and carrying out city cleaning and sanitation services; (d) urban bus services; (e) hospitals, clinics, dispensaries and pharmacies; (f) fire brigade services; and, (g) telecommunication services.

them, it is not only binding upon the disputing parties but also having the force of *res judicata* without appeal unless it is tinged, among other things, with illicit object or induced through void or falsified documents, or that the compromise was reached without the knowledge of prior court judgment having the force of *res judicata* and without appeal. This solution that ensures both parties' satisfaction and a continued business relationship is termed as 'Compromise.' A compromise is defined as:

... a contract whereby the parties, through mutual concessions, terminate an existing dispute or prevent a dispute arising in the future.[60]

A compromise, having been reached through negotiation or conciliation, can easily be enforced as it is the manifestation of both parties' consensus and amicable solution.

On the other hand, if the parties still cannot, partially or totally, agree on the issues of contention or that they cannot reach on a settlement agreement within the agreed time or if no time frame is agreed upon, within six months, the conciliator will be forced to draw up a 'memorandum of Non-conciliation'.[61] In a labor dispute, the Conciliator has to carry out his duty within 30 days. If, within the stated time, the conciliator fails to bring about an amicable solution, the conciliator is duty-bound to report to the Ministry or Bureau *'...with <u>detailed</u> reason thereof'*.[62] (Emphasis added)

Albeit one wonders whether and how much detailed the report should be, the Amharic version does not at all convey the same message. Furthermore, the English version should not, at least, be taken to convey the message that the report could be inclusive of all the statements of offers and admissions made, during the negotiation process either around the negotiating table or in caucuses, by the parties in their effort at reaching at a mutually agreeable settlement. It is proper, though, that the Ministry or the Bureau exercise some degree of control over the conciliator, be it paid or otherwise, to see to it that he/she is properly discharging his/her duties within the given time frame.[63] At this juncture, it is worth noting that once the conciliation proceeding is set in motion, be it compulsorily imposed or owing to the parties' agreement, then, the court or the Labor Relations Board cannot have jurisdiction to litigate the case unless, before the expiration of the 30 days, a

[60] The Civil Code of Ethiopia, 1960, Art. 3307
[61] IBID, Arts. 3320-3321
[62] Art. 142 (3)
[63] The Civil Code of Ethiopia, 1960, Art. 3323

memorandum of non-conciliation is drawn up by the conciliator or the 30 days time-limit has expired without the parties having reached a settlement.[64]

In connection to individual labor disputes, it must be noted here that, though not assisted by the Ministry or Bureau in assigning a conciliator, the parties can pick up conciliation proceedings before or during the court proceeding.[65]

III. PERMANENT AND *AD HOC* LABOR RELATIONS BOARD

Once the Conciliation proceedings fail to bring forth a negotiated settlement, what would be the next step for the disputing parties to pursue?

Art. 142(3) provides thus:

...Any party involved other than those indicated under Sub-Article (1) (a) of this Article may submit the matter to Labor Relations Board. If the dispute as per Sub-Article (1) (a) of this Article concerns those undertaking described under Article 136(2) of this Proclamation, one of the disputing party may submit the case to ad hoc Board.

The following claims can be made out of the reading of the above provision. Firstly, the power to conciliate and decide over all collective labor disputes, except those on matters of wages and other benefits[66] arising in the EPSU, is vested in the Permanent Labor Relations Board (hereinafter "LRB"). The omission of the word 'Permanent' from the legal provision both in the Amharic and English version is perplexing, though. Secondly, the power to decide over collective labor disputes arising particularly out of wages and other benefits in the EPSU is vested in the *Ad Hoc* LRB. This assertion, coupled with art. 144(2), seems to firmly establish the claim. However, the poor draftsmanship is apparent under arts. 147 (1)(a) and (b) that may challenge the afore-mentioned claims.

Art. 147 provides thus:

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[64] IBID, Art.3321

[65] The Civil Procedure Code of Ethiopia, 1965, Arts. 274-277.

[66] Art.142(1): The conciliator appointed by the Ministry shall endeavor to bring about a settlement on the following, and other similar matters of collective labor disputes: (a) wages and other benefits; (b) establishment of new conditions of work; (c) the conclusion, amendment, duration and invalidation of collective agreements; (d) the interpretation of any provisions of this Proclamation, collective agreements or work rules; (e) procedure of employment and promotion of workers; (f) matters affecting the workers in general and the existence of the undertaking; (g) claims related to measures taken by the employer regarding promotion, transfer and training; (h) claims relating to the reduction of workers.

(1) The Permanent board shall have the following power:

(a) to hear labor disputes on matters specified in sub-article (1) of Article 142, except for (a), to conciliate the parties and to give orders and decisions

(b) *except for sub-article 1 (a) of Article 142 to hear cases submitted to it by one of the disputing parties after the parties fail to reach an agreement in accordance with sub-article (3) of article 142*.

On the contrary, art. 147 (2) states:

The Ad hoc Board shall have the power to hear labor disputes on matters specified in sub-article 1 (a) of Article 142, to conciliate the parties and to give any orders and decisions.

Let us raise a couple of questions here: does it mean that the Permanent LRB does not have power to conciliate and give decisions over collective labor disputes relating to wages and other benefits arising both in EPSU and UOC? Or should one say that it is the jurisdiction of the *ad hoc* LRB, envisaged in the second paragraph of art.142 (3) and 144 (2), being extended to be inclusive of those collective labor disputes relating to wages and other benefits arising in the UOC?

The Author responds to both queries in the negative and humbly submits that the confusion emanates from the poor draftsmanship under Arts.147 (1) (a), (b), and (2). Thus, the Author holds that only collective labor disputes on matters of wages and other benefits arising in the EPSU are vested in the *Ad Hoc* LRB and all other collective labor disputes are to be settled under the jurisdiction of the Permanent LRB.

Incidentally, it is noteworthy, at this point, that reposing conciliation proceeding and decision-making of a case in the same person (s) or body, such as the LRB is entitled to, can prove itself a complete fiasco: not only does it hinder the parties from making offers and admissions during the negotiation lest it should boomerang on them but also lures them to be more focused in persuading the conciliator/decision-maker instead of pursuing a concerted problem-solving approach.

IV.THE PLACE OF ARBITRATION UNDER THE LABOUR PROCLAMATION

The significant role of Arbitration as an extra-judicial dispute settlement method both in the domestic and international commercial transactions cannot be overemphasized. Its wide spread use streamlined by internationally acceptable legal regime and the unwavering acceptance by the international trade actors have currently made it that one cannot think of international trade without at the same time thinking of Arbitration. The fact that Ethiopia does not yet have a coherent and modern arbitration laws, compounded by the snail's pace it is trekking to adopting the UNCITRAL Model Law on International Commercial Arbitration (1985) and to ratify the New York Convention on the Recognition and Enforcement of arbitral awards (1958) has created a cloudy picture as to whether Ethiopia is committed to promote arbitration. The concept of arbitration, as a dispute settlement method, is even confused with the concept of conciliation in various legislative enactments.[67] On the other hand, the legislator's attempt at promoting and encouraging the practice of arbitration by encompassing " inspiring clauses" in various enactments and, more importantly, by making it compulsory for the settlement of certain disputes is laudable.[68]

Let us now turn on as regards how arbitration features in the settlement of labor disputes. In an attempt to shed some light on the legal regime on arbitration in Ethiopia, not only is the place of arbitration in labor dispute settlement discussed hereunder but also cross-references made to pertinent existing enactments.

The Labor Proclamation, Art.143, provides thus;

[67] The Revised Family Law of Addis Ababa and Dire Dawa Proclamation No. 1/2000, Arts.119-121. Similarly, note the use of the term `arbitration` in stead of 'conciliation' in the Family Laws of the States of Oromiya, Amhara and Southern NNP, on matters of divorce and its effects while, at the same time, vesting exclusive jurisdiction on those matters in the courts.

[68] Federal Cooperative Societies Proclamation No. 147/1998, supra note 14, Art.47; Also note similar 'Compulsory Arbitration' Provisions in The Revised Family Law of Addis Ababa and Dire Dawa Proclamation no. 1/2000, Art.118; Arts.129 and 133 of the Family Laws of the States of Amhara and Southern NNP respectively.

(1) *Notwithstanding the provisions of article 141 of this proclamation parties to a dispute may agree to submit their case* to *arbitrators or conciliators, other than the Minister for settlement in accordance with the appropriate law.*

(2) If the disputing parties fail to reach an agreement on the case submitted to arbitration or conciliation under Sub-article (1) of this Article the party aggrieved may take the case to the Board or to the appropriate court.

It should be underlined that, from a reading and re-reading of all the provisions in the Labor Proclamation in its entirety, nowhere is the word 'arbitration' or 'arbitrator' alluded to but in the afore-mentioned Provision!!! One would, thus, regrettably end up fishing out only the terms 'arbitrators' (Para I) and 'arbitration' (Para II) to fully propel 'arbitration' with all its repercussions into the sphere of labor disputes. Nonetheless, despite yet the poor draftsmanship of the Provision, the recurrence of the terms indicative of arbitration in the Provision undoubtedly insulates its being a slip of a pen. At any rate, the arbitrability of labor disputes does not seem to have been challenged in the Ethiopian legal system. Therefore, paragraph (1) of the above Provision could be briefly put as enabling disputing parties to agree to submit their case to arbitrators for settlement in accordance with the appropriate law. Or simply put, parties to a collective labor dispute have the right to enter into an arbitration agreement either by inserting it in the main contract, i.e., arbitral clause (probably in the collective agreement) or concluding it as a separate agreement, i.e., arbitration submission. At this juncture, it should be born in mind that if a party relies on a valid arbitration agreement, courts will stay their proceedings in deference to it.

Arbitration differs from Negotiation, Mediation or Conciliation in that "…arbitration is a form of adjudication leading to unilateral decision-making by an authoritative third party."[69] Thus, as arbitration and conciliation are different dispute settlement methods, it should be underlined that, under the afore-mentioned provision, arbitration is by no means substituting for nor is it used interchangeably with conciliation. In collective labor disputes, arbitration is rather to be resorted to only if conciliation had failed to bring about an amicable settlement or, in case conciliation is not compulsory or not agreed to

[69] Amazu A. Asouzu, supra note 9, p.18

by the parties, short of it. It is safe, thus, to conclude, from the reading of Art. 143 (1), that once the parties, assisted by the conciliator, have failed to reach a settlement agreement, then, the aggrieved party may take his case either to the LRB or to an arbitrator/ arbitration tribunal. Hence enabling parties to opt out of LRB (*Ad Hoc* or Permanent) to settle their disputes through arbitration in accordance with the appropriate law.

The arbitration proceedings will be governed by the mandatory rules of arbitration under the Ethiopian laws, i.e., ***lex loci arbitri*** plus parties tailored arbitration rules or any state's arbitration laws to which the parties have referred, i.e., ***lex electionis*** or the arbitration law of a permanent arbitration institution if the parties submitted their case to such an institution for settlement.

It behooves us to mention, at this point, that arbitration proceedings lead to a binding decision. In other words, an arbitral award given by the arbitrator/ arbitration tribunal is binding, if not final, and is enforceable both domestically and internationally. It should also be born in mind that the disputing parties are not expected to reach at a settlement agreement, though settlement agreements if reached in the process of arbitration may be reduced into an arbitral award by consent. Art. 143 (2), thus, can be constructed precisely to mean: firstly, failing conciliation proceedings, either party can proceed with his case in the LRB or through arbitration. Secondly, in case the award-debtor is dissatisfied with the decision of the arbitrator, he/ she may appeal to the Federal High Court or the State Supreme Court in so far as the parties have not waived their right to appeal.[70]

Whether individual labor disputes can be submitted to arbitration begs a question, though. The Labor Proclamation does not expressly restrict the arbitrability of individual labor disputes nor can one conclusively assert that only courts are empowered to adjudicate over these disputes. This author would like to suggest, *en passant*, that the fact that an enactment confers jurisdiction on a court or other tribunal to determine any matter should not, on that ground alone, be construed as preventing the matter from being determined by arbitration. Thus, the non-arbitrability of a subject matter should be proven by

[70]The Civil Procedure Code of Ethiopia, 1965, Art. 350(2)

showing that a particular court has exclusive jurisdiction to adjudicate the matter or that a particular legislative enactment prohibits the submission of the disputes in connection with a particular subject matter to arbitration.

V. ARBITRATION PROCEEDING AND LRB: SOME QUERIES

In settling collective labor disputes, the pertinent organs entrusted to do the job are: conciliator, arbitrator/ LRB, and the Federal High Court. Arbitration proceeding and resorting to *ad hoc* or permanent LRB are set at the same rung of the ladder. One would but wonder whether both institutions have equal powers in handling and settling collective labor disputes. The following queries deserve some treatment here: What differences and similarities can we decipher from the two bodies in adjudicating a case? What exactly is their distinguishing hallmark? In a bid to briefly answer the queries posed, the following four items are discussed:

I. The LRB is not bound to apply the rules of evidence and procedure. Art. 149 (5) provides thus:

The permanent or the ad hoc Board shall not be bound by the rules of evidence and procedure applicable to courts of law, but ***may inform itself in such manner as it thinks fit.*** (Emphasis added***)***

Thus, the LRB can, within the framework of the rules of evidence and procedure issued by itself as it is empowered under art.148, proceed in handling the case in a flexible and informal manner as it thinks fit in informing itself. The apparent unfettered discretion of the LRB seems, to say the least, bizarre. Though it is a commonplace in the commercial arbitration proceedings, especially in those states that have modern commercial arbitration rules, it seems to be controversial in Ethiopia. Firstly, Art. 3345 (1) of the Civil Code of Ethiopia states:

The Procedure to be followed by the arbitration tribunal shall be as prescribed by the Code of Civil Procedure.

This, in turn, will take us into art.317 (1) of the Civil Procedure Code:

The procedure before an arbitration tribunal, including family arbitration, shall, as near as may be, be the same as in a civil court. (Emphasis added)

One can simply conclude from here that the Board may not be expected to be manned by persons who have the savvy to apply the procedural or evidence rules. On the other hand, in arbitration proceeding, that the arbitrator or arbitration tribunal must be equipped with a necessary savvy to apply the procedural and evidence rules seems to be inevitable. Interestingly, the fact that arbitrators who are appointed to settle disputes arising in cooperative societies are duty-bound to conduct their hearing and fulfill all of their duties in accordance with the Civil Procedure Code would but leave us in a quandary. The assertion that procedural rules in an arbitration proceeding should be strictly followed is well accentuated by the fact that irregularities occurring in the proceeding could be used as a valid ground for appeal against the arbitral award.[71]

The attempts made in introducing modern arbitration rules, sidelining the afore-mentioned requirement, by the arbitration institutions in Ethiopia is to be encouraged as it serves the purpose for which arbitration stands. The arbitration rules of the Ethiopian Arbitration and Conciliation Center (EACC) (2004), Ethiopian Chamber of Commerce (ECC) (1999), and Addis Ababa Chamber of Commerce (AACC) Arbitration Institute are by all standards modern arbitration rules.

In relation to the issue at hand, Art. 15 (1) of the ECC states:

… the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party has the right to be heard and is given a fair opportunity to present its case.

This clause, inserted in the arbitration rules of all the afore-mentioned arbitration institutions, renders arbitration proceedings, administered by these institutions, insensitive to the procedural niceties put forward as a *sine qua non* for conferring arbitration proceedings and arbitral awards the status and privilege that it enjoys in the courts of law. In this author's opinion, it is high time that such arbitration institutions in Ethiopia with modern international arbitration laws emerged. It should be quickly added to it, though, that the adoption of these modern international arbitration laws by the institutions to co-exist with the out-dated arbitration rules enshrined both in the Civil Code and Civil Procedure Code is like decanting new wines in old bottles. At the same

[71]IBID, Art. 351(c)

time, losing sight of the mandatory rules of the seat of arbitration, *i.e., lex loci arbitri*, could also spell disastrous both for the institutions and the litigating parties. The case re Addis Ababa Water and Sewerage Authority V. Salini Costrutori S.P.A[72] is a case in point. In this case, AAWSA and Salini Costrutori S.P.A agreed in their contract that the seat of arbitration to be the City of Addis Ababa and the applicable procedural and substantive laws to be that of Ethiopia. Salini Costrutori S.P.A institutes an arbitration proceeding in the International Chamber of Commerce (ICC) Court of Arbitration in Paris, France. Despite AAWSA's contest over the jurisdiction of ICC, ICC Court of Arbitration, having been *prima facie* satisfied that jurisdiction could exist, decided that an arbitral tribunal should be established to determine over jurisdictional matters. The arbitral tribunal decided that jurisdictional matters would be decided as the parties go along litigating their case on the merit.

Here, one cannot but wonder as to how a court or an arbitrator decides to hear the case on the merit without, from the outset, firmly establishing its jurisdiction. To complicate matters, AAWSA submitted an application to the Secretariat of the ICC Court claiming that the three arbitrators (constituting of the arbitral tribunal) are not impartial and that they should be disqualified. The Court utterly rejected the claim and decided that the parties should continue to litigate their case. The crucial point here is whether AAWSA can appeal to court against the decision and as to which court it can appeal to. In this regard, art. 7 (4) of the Rules of Arbitration of the International Chamber of Commerce (1998) is precise and clear in terms. It reads as:

The decisions of the [ICC] Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final and the reasons for such decisions shall not be communicated.

On the other hand, the arbitration laws of Ethiopia, under art. 3342 (3) of the Civil Code of Ethiopia, is unambiguous in establishing the following:

Where the application for disqualification is dismissed, this decision may be appealed against in court within ten days.

[72] Addis Ababa Water and Sewerage Authority V. Salini Costrutori SPA, Federal Supreme Court, Appeal file no. 6298/93, December 15, 1994 E.C

Thus, AAWSA appealed against the decision to the Federal Supreme Court stating mainly that the arbitration rules of Ethiopia is to govern their arbitration proceedings and that the seat of arbitration is in Ethiopia, and therefore, that an appeal lies against the decision. Thus, the Federal Supreme Court entertained the appeal. The Federal Supreme Court decided not only to disqualify the arbitrators but also severely censured the Arbitration Tribunal for what it called an "erroneous stance" in continuing to hear the parties on the merit without deciding on its jurisdiction over the case.

From the Federal Supreme Court's decision over the case, it seems clear that courts would not compromise the strict applicability of the Ethiopian Arbitration laws. Thus, Arbitration institutions in Ethiopia may find it difficult to operate until the existing laws are updated to suit the laws and practices of modern commercial arbitration.

II. Another peculiarity that is embedded in the Labor Proclamation with regards to the LRB seems to be what is stated under Art. 150 (3):
in reaching its decision, the Board shall take into account the substantial merits of the case, and need not follow strictly the principles of substantive law followed by civil courts.

In effect, the provision empowers the LRB to act as *amiables compositeurs* or in accordance with *ex aequo et bono*. The following statement can give a succinct explanation on the concept of *Compositori amichevoli* or power to act as *amiables compositeurs* :
…enabling the arbitrator, when applying a specific law, to derogate from a strict application of the law, if it considers that such strict application would lead to an unjust result.[73]
The distinction should also be noted that the power to act *ex aequo et bono* also authorizes the arbitrator to decide according to equity and good conscience without the

[73] International Trade Center (ITC)-UNCTAD/WTO, Arbitration and Alternative Dispute Resolution: How to Settle International Business Disputes (2001), XVII, 266, Geneva: ITC, 2001, P.33.

need to determine the applicable law.[74] In both instances, the bottom line is that the arbitrator cannot disregard the public policy rules of the seat of arbitration. Now, we ask: Can an arbitrator sitting to settle a collective labor dispute be granted the same right to disregard the principles of law and decide according to what is fair and good conscience? The Civil Code defines arbitration as a contract in which parties entrust the solution of their existing and future disputes to a third party, arbitrator, who decides in accordance with the principles of law.[75] This legal definition does not favor the role of an arbitrator as *amiables compositeur*.

On the other hand, the Civil Procedure Code states as:

The tribunal shall …decide according to law unless by the submission it has been exempted from doing so.[76]

This idea of amiable composition, which was absent in the Civil Code in 1960, was introduced to the Ethiopian legal system five years later by the Civil Procedure Code of 1965. Whether this was a deliberate legislative move to fill the gap in the Civil Code of 1960 leaves us in limbo. However, similar legislative move, with the intent to fill similar legal lacunae, is worth mentioning here. In re High Way Authority V. Solel Boneh Ltd., May 14, 1965, the Court held:

Although by Art.3194 (1) of the Civil Code, a court may not order administrative authorities to specifically perform their obligation, a court is not thereby precluded from ordering specific performance of an agreement to submit disputes to arbitration.

To avoid similar court decisions, the need for a clear prohibitive clause was apparent and Art. 315 (2) of the Civil Procedure Code was inserted; thereby, rendering disputes arising from administrative contracts non-arbitrable. Juxtaposing Art.317 (2) of the Civil Procedure Code to Art.3325 (1) of the Civil Code, thus, would enable us to conclude that an arbitrator can act as an *amiables compositeurs*. Obvious as it may seem, though, the answer to the question at hand may not be a conclusive 'yes'. Some legal scholars argue

[74] IBID

[75] The Civil Code of Ethiopia, 1960, Art. 3325

[76] The Civil Procedure Code of Ethiopia, 1965, Art.317 (2)

that Art.317 (2) should not be given effect as it is inconsistent and contradictory with the definition of arbitration in the Civil Code, stating mainly that procedural laws should neither limit nor extend substantive rights that are definitively dealt with in the substantive laws, in this case, the Civil Code.[77] This limited work may not dwell on arguing in favor or against this claim. The author would like to note in passing, though, that this way of interpreting the Ethiopian arbitration laws would not only nullify Art.317 (2) but also render ineffective those similar clauses embedded in the arbitration rules of the arbitration institutions, i.e., AACC, ECC, and EACC to which many of the legal scholars subscribed to their being modern arbitration rules. Mention can also be made here of Art.209 of the Maritime Code of Ethiopia of 1960, where, under a contract of carriage of goods by sea, the carrier cannot issue a Bill of Lading that, in its arbitration clause, entitles (an) arbitrator(s) to act as (an) *amiables compositeur(s)*.[78] This is no doubt indicative of the fact that the legislator would single out specific legal relationships whose dispute settlement via arbitration ousts the arbitrator of the power to act as *amiables compositeur* or according to *ex aequo et bono*!!!!

III. Art. 147 (4) provides as:

Orders and decisions of the Board shall be considered as those decided by civil courts of law.

From a reading of this Provision it appears that the Board's decision or order is considered to be at par with any court's decision. Thus, there is no need for the judgment creditor to have it homologized (entered into a court judgment) as is expected of the award-creditor in an arbitration proceeding by virtue of Art.319 (2) of the Civil Procedure Code. Art.319 (2) thus states:

An award may be executed in the same form as an ordinary judgment upon the application of the successful party for the homologation of the award and its execution.

In other words, in case the award-debtor is not willing to discharge his obligations under the award, the award-creditor may not be able to have it executed unless the award is

[77] Bezzawork Shimelash, "The Formation, Content and Effect of an arbitral submission under Ethiopian law" Journal of Ethiopian Laws, Vol. XVII (1994), p. 83.

[78] Art.209 provides: "An arbitration clause inserted in bill of lading may in no event grant to the arbitrators the power to settle a difference by way of composition".

entered into a court judgment, i.e., order of ***exequatur*** (let it be executed order) is granted by the court.

IV. Finally, in the LRB, all hearings are public, unless decided otherwise by the Board Chairman to make it *in camera.*[79] In contradistinction to this, arbitration proceedings are at all times confidential, i.e., both the parties and the arbitrator cannot disclose to an outsider about the existence of the dispute itself and the matters discussed during the proceeding. However, with the consent of the disputing parties, the arbitral award may be made public. Thus, the parties are ensured that confidentiality will be maintained in an arbitration proceeding. It should be pointed out, though, that the sanctity of confidentiality in arbitration proceedings taken into account, the role of the Government as ***amicus curiae*** in ensuring, in appropriate cases, that arbitrators "…consider not only the interest of the parties immediately concerned but also the interest of the community of which they are a part…", as envisaged under Art.150 (2), may be put in a precarious position.

V. APPEAL PROCEEDINGS

Recourses to challenge an arbitral award can be exercised either by initiating a setting aside procedure or lodging an appeal in the competent court. The grounds for granting leave to appeal are enumerated under Article 351 of the CPC. Similarly, the grounds for granting leave to set aside the award are, in an apparently exhaustive manner, listed under Article 356 of the CPC. It should also be noted that whilst the setting aside procedure is available at any time at any cost for the award-debtor, the appeal procedure can be waived with the proviso that parties agree to waive their right of appeal "with full knowledge of the circumstances".[80] Thus, as indicated earlier on, the parties to an arbitration agreement may agree that the arbitral award will be final and binding. In that case, no right of Appeal exists by virtue of the parties' agreement. By the same token, it should be born in mind that institutional arbitrations are mostly final.[81]

Thus, unless and until the parties waive their right of appeal by the arbitration agreement, the award-debtor has the right to appeal, among other things, by alleging that "…the award is inconsistent, uncertain or ambiguous or *is on its face wrong in matter of law or*

[79] Art.149 (4)
[80] Art.350(2) of the CPC
[81] Art.27(1) of the EACC Arbitration Rules; Art.20(2) of the AACC Arbitration Institute Arbitration Rules

fact". [Emphasis mine]. This is to show that whilst the award-debtor can appeal against the arbitral award both on questions of law and fact by alleging that the arbitrator or the arbitral tribunal erred in its findings of the law and the facts, the Board's findings of fact is final and conclusive.[82] Article 154, thus, establishes that an aggrieved party may appeal to the Federal High Court only on questions of law. Could it also be argued that, since the arbitration proceedings and the LRB are in the same echelon in the labor dispute settlement process, the findings of fact by the arbitrators are final and conclusive by virtue of article 153 and, therefore, enabling us to derogate from article 351(a) of the CPC? I am afraid not!

VI. COSTS

Article 161(1) exempts all cases submitted, under article 141 and 147, to conciliation and LRB from the payment of any fees. Similarly, any case submitted to the Court is exempt from court fees. It is logical to ask then that: who bears the cost of the conciliation proceedings and the conciliators' fees and/or the LRB staff members? Article 145(4) points out that the Board members serve on par time basis without remuneration. However, the Ministry or Bureau may fix some sort of standard fees for attendances at meetings of the Board.[83] It is left at limbo as to what happens with the conciliators who have expended both their time and energy for the noble cause. It is reasonable to believe that the so-called 'standard fees for attendances at meetings' will similarly be served on the conciliators. It could, however, be argued that conciliators would not be remunerated, unless otherwise expressly agreed, but are entitled to the reasonable expenses incurred for and during the proper discharging of their duties as per Article 3323 of the Civil Code. If such an argument holds true, a conciliator should take heed of negotiating the issue of remuneration when and if he/she accepts the Ministerial or Bureau assignment of his/her being a conciliator.[84] It should, however, be noted here that whenever the conciliator is appointed by the parties themselves, an institution or by a third party, it is highly

[82] Art.153
[83] Art.145(4)
[84] Art.3318(3) of the Civil Code states:
"The person appointed conciliator shall be free to accept or to refuse his appointment."

probable, in a labor dispute, that the conciliator will demand for a fair share of the remuneration.[85]

If the case is submitted for arbitration, the cost will perhaps be doubled. In an arbitration proceeding, the costs may relate (though not exhaustive) to the arbitrators' fees and expenses, the fees and expenses of any arbitral institution concerned, and the legal and other costs of the parties. Add to this the *ad valorum*[86] stamp duty for the arbitral award and the costs for the process of homologization of the arbitral award into a court judgment. In deed, the cost in arbitration, particularly in institutional arbitration, would be much higher or perhaps is incomparable with the free service accorded in the LRB. It is not certain whether the parties or the Ministry or Bureau are duty-bound to pay the standard fees for the conciliators' or Board members' attendances in meetings. Despite the glaringly inviting Article 161, it may be concluded that the disputing parties should shoulder the costs; at least this seems to be logical. Yet, the costs for the parties in an arbitration proceeding would still be tasking them heavily.

5.3 CONCLUSION

It has been tried to show that ADR methods feature in settling labor disputes: individual labor disputes, though vested in the First Instance Courts of the States, can be submitted to conciliation and/or arbitration. In the settlement of collective labor disputes, Conciliation is used both in the Essential Public Service Undertakings (EPSU) and in those Undertakings that are otherwise categorized (UOC). Whilst it seems to have been left for the discretion of the parties whether to resort to conciliation or not in the EPSU, it is compulsorily imposed on the UOC. In the event that conciliation does not bear fruits, parties may resort to LRB (*ad hoc* or permanent). *Ad Hoc* LRB seems to have been devised for settlement of disputes arising from wages and other benefits in the EPSU. The judgment-debtor has the right to appeal against the decision of LRB to the Federal High Court or State Supreme Court.

Disputing parties may opt out of LRB, though. They may agree to submit their disputes for settlement to arbitration. The award-debtor may similarly appeal against the arbitral award, provided that, under their submission, the parties have not waived their right of

[85] Art.3318(2) of the Civil Code *cum* Art.143.
[86] Art.2(1) *cum* Schedule of Stamp Duty Rates of the Proclamation to Provide for the Payment of Stamp Duty No. 110/1998.

appeal. The award-debtor may also resort, under certain circumstances, to the setting aside procedure.[87] Here, it is good to note that arbitral awards are final i.e., no appeal to court lies against the award, under the arbitration rules of arbitration centers, if the parties submitted their disputes to the institutions so-far established and operating in Ethiopia.

Finally, in Ethiopia, the use of ADR methods in the commercial dispute settlement is yet at its infantile stage. The low profile that ADR methods suffer from, amongst the business community, needs to be quickly addressed so that the emerging conciliation and arbitration centers in Ethiopia play their role in effectively settling disputes arising both from domestic and international trade and investment.

In this author's opinion, it is imperative for the efficacy of conciliation proceedings that statements, offers, admissions, suggestions made during the conciliation proceedings should not be adduced as evidence in court against the party making them. Today, short of legal provisions to this effect, parties may find it difficult to be transparent in the conciliation proceedings.

The arbitration laws in force are far from being modern, too. The fact that Ethiopia has recently ratified the Hague Convention on the Pacific Settlement of International Disputes (1899)[88] and its commitment under the COMESA Treaty[89] to accede to multilateral agreements on investment dispute resolution, this author hopes, may serve as a catalyst in the process of ratifying the NYC and the International Convention on Settlement of Investment Disputes Between States and Nationals of Other States (ICSID), otherwise known as "The Washington Convention of 1965".[90]

Exercise

Ato Tecle seems to hold the opinion that, as the law now stands, individual labour disputes are within the jurisdiction of both the Federal First Instance Court and Woreda Courts of the Regional States. As a result of this, he further argues that, this

[87] The Civil Procedure Code of Ethiopia, 1965, Arts.355-357
[88] Convention for the Pacific Settlement of International Disputes (1899) Ratification Proclamation no. 348/2003, Fed.Neg. Gaz. Year 9, No. 68, 2003.
[89] The COMESA Treaty, Art.162
[90] Note that Ethiopia signed the ICSID Convention on September 21, 1967 but has not yet ratified it. On the impact and relevance of the NYC and ICSID Convention on the Ethiopian legal system, see Tecle Hagos Bahta, Recognition and Enforcement of Foreign Commercial Arbitral Awards in Ethiopia, Senior Thesis, AAU, Faculty of Law, 2002 (Unpublished)

may lead to "forum shopping" by the disputing parties in Regions where Federal courts have been established. Meaning they may, at their pleasure, either submit their file to the federal or the woreda courts. Do you agree with him? Why? Why not?

Industrial Action

Another way of settling dispute which is applicable in the labour employment regime is the so-called "industrial action". This action may take either of the two forms namely; *strike or lock out.* When the action is taken by the employees, it will be a strike while the measure will be lock-out where it is exercised by the employer. In both cases the measure is a sort of self help action where the aggrieved party takes its own action in view to compelling the other party to accept its terms. Work stoppage or slow down is the typical way of undertaking strike in an industrial sector. Conversely denying access to employees to work place or work facilities is also a typical case of lock-out.

It is well known that one of the primary obligations of an employee is to render personal service to the benefit of the employer (Art.13 LP). Provision of work to the worker is also one of the primary obligations of the employer (Art.12 LP). Literally, strike or lock-out is failure to comply with the main obligation of the respective parties. Thus recognizing strike or lock-out as a lawful measure is an exception to the general rule.

Due to this, the Labour Proclamation has laid down rigorous procedures that should be satisfied prior to calling a strike.[91] Not only that the requirement to be satisfied is rigorous but also that there are few enterprises which are denied of their right to strike lock-out. [92] However, those enterprises which are denied the right to take industrial action are being provided with a special procedure to protect their interests through the establishment of the so-called "ad hoc Labour Relations Board".

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[91] See, Arts.157-160 of LP.
[92] Ibid, Arts.136(2) &157(3)

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ILO principles concerning the right to strike[93]

*Bernard GERNIGON, Alberto ODERO and Horacio GUIDO**

It may be surprising to find that the right to strike is not set out explicitly in ILO Conventions and Recommendations. It has been discussed on several occasions in the International Labour Conference during the course of preparatory work on instruments dealing with related topics, but for various reasons this has never given rise to international standards(Conventions or Recommendations) directly governing the right to strike. However, the absence of explicit ILO standards should not lead to the conclusion that the Organizations disregards the right to strike or abstains from providing a protective framework within which it may be exercised.

Two resolutions of the International Labour Conference itself –which provide guidelines for ILO policy –in one way or another emphasized recognition of the right to strike in members States. The "Resolution concerning the Abolition of Anti- Trade Union Legislation in the States members of the International Labour Organization" adopted in 1957, called for the adoption of "laws… ensuring the effective and unrestricted exercise of trade union rights, including the right to strike by the workers"(ILO,1957,p. 783).Similarly, the "Resolution concerning Trade Union Rights and Their Relation to Civil Liberties", adopted in 1970, invited the Governing Body to instruct the Director-General to take action in a number of ways "with a view to considering further action to ensure full and universal respect for trade union rights in their broadest sense", with particular attention to be paid, inter alia ,to the "right to strike" (ILO, 1970 ,pp.735-736). The right to strike has also been affirmed in various resolutions of the ILO's regional conferences and industrial committees, as well as by other international bodies (sees Hodges-Aeberhard and odero, 1987, pp.543 and 545).

Furthermore, though it does not explicitly mention the right to strike, the Freedom of

[93] International Labour Review,Vol.137(1998), No.4 (Foot notes omitted)

Association and protection of the Right to Organize Convention, 1948(No.87), establishes the right of workers' and employers' organizations to "organize their administration and activities and to formulate their programmes" (Article 3), and the aims of such organizations as "furthering and defending the interests of workers or of employers" (Article 10), (ILO, 1996a, pp. 528 and 529). On the basis of these provisions, the two bodies set up to supervise the application of ILO standards, the Committee on Freedom of Association (since 1952) and the Committee of Experts on the Application of conventions and Recommendations(since 1959),have frequently stated that the right to strike is a fundamental right of workers and of their organizations, and have defined the limits within which it may be exercised laying down a body of principles in connection with the right to strike –giving rise to substantial "case law" in the broadest sense of the term –which renders more explicit the extent of the provisions mentioned above.

Of the remaining supervisory bodies of the ILO, the committees established under Article 24 of its Constitution do not deal, in principle, with matters relating to strike, since the Governing Body generally refers the corresponding complaints to the Committee on Freedom of Association. The few Commissions of Inquiry that have been set up in response to complaints under article 26 of the ILO Constitution for non- observance of conventions relating to trade union rights refer in their conclusions to the principles of the Committee on Freedom of Association and of the Committee of Experts, and the same is true fact –finding and Conciliation Commission on freedom of Association.

Finally, the ILO conferences committee on the Application of Standards has noted that a broad consensus exists among its members regarding the principal of the right to strike, although the views of the Workers' Group, the Employers' Group and the Government delegates do not coincide (see ILO, 1994b, pp.25/31- 25/41, and ILO, 1998a, pp.18/23-18/25). The Workers' Group fully supports the approach of the Committee of Experts regarding the right to strike, considering it to be inalienable from the right to freedom of association protected by Convention No.87 and by the principles embodied in the ILO Constitution. The Employers' Group considers that the right to carry out direct action – for workers the right to strike and for employers the right to lock out –could perhaps be

acknowledged as an integral part of international common law and, as such, it should not be totally banned or authorized only under excessively restrictive conditions. Nevertheless, the Employers' Group has emphasized that Conventions No.87 and No.98 do not contain specific provisions regarding the right to strike and, therefore, it does not accept that the Committee of Experts should deduce from the text of these Conventions a global, precise and detailed, absolute and unlimited rights. Several Government delegates on the Conference Committee on the Application of Standards, during the discussion of the General Survey of the Committee of Experts on Freedom of Association and Collective Bargaining, in 1994, stated their general agreement with the position of the Committee of Experts regarding strikes, while others expressed some doubts as regards particular considerations in the General Survey, or identified specific problems arising notably in connection with the public service; the majority of Government members made no comment. It should be borne in mind that, unlike the other supervisory bodies, the Conference Committee on the Application of Standards has a particularly large number of members (214 in 1998, excluding deputy members).

The purpose of this article is to elucidate the principles regarding the right to strike laid down by the Governing Body's Committee on Freedom of Association and by Committee of Experts on the Application of Conventions and Recommendations, which have evolved substantially over the last decade. It is interesting to note that these bodies take each other's reports into account: the Committee of Experts frequently refers in its observation to the reports of the Committee on Freedom of Association in matters relating to respect for freedom of association in different countries, while the latter consults the Committee of Experts on the legal aspects of the cases it examines, or employs principles laid down by the Committee of Experts.

Taken up in turn are general issues, objectives of strikes, workers included or excluded, conditions for exercising the right to strike, strikes and collective bargaining, anti-union discrimination, abuses, legislative restrictions, summary of principles, and final observation.

General issues The basic principles of the right to strike

From its very earliest days, during its second meeting, in 1952, the Committee on Freedom of Association declared strike action to be a right and laid down the basic principal underlying this right, from which all others to some extent derive, and which recognizes the right to strike to be one of the principal means by which workers and their associations may legitimately promote and defend their economic and social interests (ILO, 1996d, paras. 473-475). Over the years, in line with this principle, the Committee on Freedom of Association has recognized that strike action is a right and not simply a social act, and has also:

1. made it clear it is a right which workers and their organizations (trade unions, federations and confederations) are entitled to enjoy;
2. reduced the number of categories of workers who may be deprived of this right, as well as the legal restrictions on its exercise, which should not be excessive;
3. linked the exercise of the right to strike to the objective of promoting and defending the economic and social interests of workers (which criterion excludes strikes of a *purely* political nature from the scope of international protection provided by the ILO, although the Committee makes no direct statement or indication regarding sympathy strikes other than that they cannot be banned outright; this matter will be examined subsequently);
4. stated that the legitimate exercise of the strike should not entail prejudicial penalties of any sort, which would imply acts of anti- union discrimination.

   These views expressed by the Committee on Freedom of Association coincide in substance with those of the Committee of Experts.

Definition of the right to strike and various types of strike action

The principles of the ILO's supervisory bodies contain no definition of strike action which would permit definitive conclusions to be drawn regarding the legitimacy of different ways in which the right to strike may be exercised. However, some types of strike action (including occupation of the work place, go –slow or work-to rule strikes), which are not merely typical work stoppages, have been accepted by the Committee on

Freedom of Association provided that they are conducted in a peaceful manner (ibid.., Para. 496). The Committee of Experts has stated that:

When the right to strike is guaranteed by national legislation, a question that frequently arises is whether the action undertaken by the workers constitutes a strike under the law. Any work stoppage, however brief and limited, may generally be considered as a strike. This is more difficult to determine when there is no work stoppage as such but a slowdown in work (go-slow strike) or when work rules are applied to the letter (work-to-rule); these forms of strike action are often just as paralyzing as a total stoppage. Noting that national law and practice vary widely in this respect, the Committee is of the opinion that restrictions as to the forms of strike action can only be justified if the action ceases to be peaceful.

The Committee considers …that restrictions on strike pickets and workplace occupations should be limited to cases where the action ceases to be peaceful (ILO, 1994a, paras.173 and 174).

Objectives of strikes

This section examines the nature of claims pursued through strike action which are covered by the body of principles set down by the Committee on Freedom of Association and the Committee of Experts. In discussing this matter, reference should be made at the outset to Article 10 of Convention No. 87 which, for the purpose s of the Convention, defines worker organizations as any organization "for furthering and defending the interests of workers". This definition is clearly of fundamental importance not only in that it sets down guidelines for differentiating such organizations is for those other types, but also because it specifies the purpose of such organizations for "furthering and defending the interests of workers" thereby demarcating the bounders within which the rights and guarantees recognized by the convention are applicable, and consequently protected in so far as they achieve or seek to achieve the stated objectives.

The nature of the demands pursued through strike action may be categorized as being occupational (seeking to guarantee or improve workers' working or living conditions),

trade union (seeking to guarantee or develop the rights of trade union organization and their leaders), or political. The two former categories do not give rise to any particular problems as from the outset the Committee on Freedom of Association has made clear decisions stating that they are legitimate. However, within the three categories of demand specified, a distinction should be made as to whether or not they directly and immediately affect the workers who call the strike. It should at once be noted that the Committee on Freedom of Association and the Committee of Experts have rejected the notion that the right to strike should be confined to industrial disputes that are likely to be resolved through the signing of a collective agreement.

Political strikes

On the basis of the definition of "workers' organization" contained in Article 10 of Convention No. 87, the Committee on Freedom of Association considers that "strikes of a purely political nature… do not fall within the scope of the principles of freedom of association" (ILO,1996d, Para. 481).

However, although the Committee has expressly stated that "it is only in so far as trade union organizations do not allow their occupational demands to assume a purely political aspect that they can legitimately claim that there should be no interference in their activities", it has also specified that it is difficult to draw a clear distinction between what is political and what is, properly speaking, trade union in character, and that these two notions overlap (ibid., Para. 457).

Hence, in a subsequent decision, the Committee concluded that the occupational and economic interests which workers defend through the exercise of the right to strike do not only concern better working conditions or collective claims of an occupational nature, but also the seeking of solutions to economic and social policy questions (ibid.., Para. 479). Along the same lines, the Committee has stated that the workers and their organizations should be able to express their dissatisfaction regarding economic and social matters affecting workers' interests in circumstances that extend beyond the industrial disputes that are likely to be resolved through the signing of a collective agreement (ibid.., Para.

484). Nevertheless, workers action should consist merely in the expression of a protest and not be intended as a breach of peace (ILO, 1979, Para. 450). In this connection, the Committee on Freedom of Association has stated that "a declaration of the illegality of a national strike protesting against the social and labour consequences of the government's economic policy and the banning of the strike constitute a serious violation of freedom of association" (ILO, 1996d, Para. 493). That said, it should be added that the principles laid down cover both strikes at the local level, and general strikes, which by their nature have markedly political connotation. As regard the geographical scope of the strike:

The Committee [on freedom of association] has stated on many occasions that *strikes at the national level* are legitimate in so far as they have economic and social objectives and not purely political ones; the prohibition of strikes could only be acceptable in the case of public servants exercising authority in the name of the State or of workers in essential services in the strict sense of the term, i.e. services whose interruption could endanger the life, personal safety or health of the whole or part of the population (ILO, 1996d,para. 492).

As regards the general strike, in its examination of one particular case, the Committee considered that "[a] 24- hour general strike seeking an increasing in the minimum wage, respect of collective agreements in force and a change in economic policy (to decrease prices and unemployment) is legitimate and within the normal field of activity of trade union organizations" (ibid.., para.494). Similarly, in connection with another case, the Committee concluded that "[a] general protest strike demanding that an end be put to the hundreds of murders of trade union leaders and unionists during the past few years is a legitimate trade union activity and its prohibition therefore constitutes a serious violation of freedom of association" (ibid.., Para. 495)

The Committee on Freedom of Association's attitude in cases where the demands pursed through strike action include some of an occupational or trade union nature and others of a political nature has been to recognize the legitimate of the strike when the occupational

or trade union demands expressed did not seem merely a pretext disguising purely political objectives unconnected with the promotion and defense of workers' interests.

The Committee of Experts also has stated that strikes that are purely political in character do not fall within the scope of freedom of association. However, the difficulty arises from the fact that it is often impossible to distinguish in practice between the political and occupational aspects of a strike, since a policy adopted by a government frequently has immediate repercussions for workers or employers; this is the case, for example, of a general wage and price freeze.

In the view of the Committee, organizations responsible for defending workers' socio-economic and occupational interests should, in principle, be able to use strike action to support their position in the search for solutions posed by major social and economic policy trends which have a direct impact on their members and on workers in general, in particular as regards employment, social protection and the standard of living (ILO, 1994a, Para. 165).

Sympathy Strikes

Where sympathy strikes are concerned, the crux of the issue is to decide whether workers may declare a strike for occupational, trade union or social and economical motives which do not affect them in a direct and immediate manner.

In its General Survey of 1983, the Committee of Experts defined sympathy strikes ("where workers come out in support of another strike") and determined that a general prohibition of sympathy strikes could lead to abuse and that workers should be able to take such action provided that the initial strike they are supporting is itself lawful(ILO, 1983b, Para. 217). This principle was then taken up in 1987 by the Committee on Freedom of Association when it examined a decree which did not ban sympathy strikes but merely regulated them by limiting the possibilities of recourse to this type of action. In the Committee's opinion, although several provisions contained in the decree might be justified by the need to respect various procedures (notification of the strike to the labour

authorities) or to guarantee security within the undertaking (the prevision of agitators and strike-breakers from entering the workplace) others, however, such as geographical or sectoral restrictions placed on sympathy strikes –which therefore exclude general strikes of this nature –or restrictions on their duration and frequently, constitute a serious obstacle to the calling of such strikes (ILO, 1987,paras. 417 and 418).

Similarly, the Committee of Experts has subsequently stated that:
Sympathy strikes, which are recognized as lawful in some countries, are becoming increasingly frequent because of the move towards the concentration of enterprises, the globalization of the economy and the delocalization of work centers. While pointing out that a number of distinction need to be drawn here (such as an exact definition of the concept of a sympathy strikes; a relationship justifying recourse to this type of strike etc.), the Committee considers that a general prohibition on sympathy strikes could lead to abuse and that workers should be able to take such action, provided the initial strike they are supporting is itself lawful (ILO, 1994a, Para. 168).

Workers who enjoy the right to strike

And those who are excluded

It should be noted, first and foremost, that Article 9 of Convention No. 87 states that "the extent to which the guarantees provided for in this convention shall apply to the armed forces and the police shall be determined by national laws or regulations" (ILO,1996a, p.528). As a result, the Committee on Freedom of Association has refused to find an objection to legislations which deny the right to strike to such groups of workers. Since the committee on freedom of association first laid down its earliest principals on the subject of strikes, and given that strike action is one of the fundamental means for rendering effective the right of workers' organizations "to organize their … activities" (Article 3 of Convention No. 87), the Committee has chosen to recognize a general right to strike, with the sole possible exceptions being those which may be imposed for public servants and workers in essential services in the strict sense of the term. Obviously, the Committee on Freedom of Association also accepts the prohibition of strikes in the event

of an acute national emergency (ILO, 1996d, Para. 527), as will be seen in a later section on this question. The Committee of Experts has in turn adopted this approach.

Public service

Both supervisory bodies were cognizant, where public servants are concerned, of the consensus reached during the preparatory discussions leading to the adoption of Convention No.87, to the effect that "the recognition of the right of association of public servants in no way prejudice the question of the right of such officials to strike" (ILO, 1947, p. 109). The Committee on Freedom of Association and the Committee of Experts both agree that when public servants are not granted the right to strike, they should enjoy sufficient guarantees to protect their interests, including appropriate, impartial and prompt conciliation and arbitration procedures to ensure that all parties may participate at all stages and in which arbitration decisions are blinding on both parties and are fully and promptly applied. It should also be stressed that, while the provisions of Convention No. 151 and of Recommendation No. 159 on labour relations in the public service adopted in 1978 cover the settlement of disputes, among other things, no explicit mention is made of the right to strike for public servants.

That being said, it should be emphasized that on the question of the right to strike in the public service, the ILO's supervisory bodies' approach is based on the fact that the concept of public servant varies considerably from one country to another. It may be deduced from the statements of the Committee of Experts and of the Committee on Freedom of Association that the concept of the public servants, where their possible exclusion from the right to strike is concerned, relates to public servants who exercise authority in the name of the state (ILO, 1996d, Para. 534). The implications of this approach are important in that the guidelines for determining those public servants who may be excluded no longer emanates from the application to them of the national law governing the public service, but from the nature of the functions that such public servants carry out. Thus, while the right to strike of officials in the employ of ministers and other comparable government bodies, as well as that of their assistants and of

officials working in the administration of justice and staff in the judiciary, may be subject to major restrictions or even prohibition (ibid., paras.537 and 538), the same does not apply, for instance, to persons employed by the state enterprise. To date, in response to complaints submitted to it, the Committee on Freedom of Association has stated that certain categories of public servants do not exercise authority in the name at the state, such as public servants in state-owned commercial or industrial enterprise (ibid., Para. 532), in oil, banking and metropolitan transport undertakings or those employed in the education sector and, more generally, those who work in the state companies and enterprises (ILO, 1984a, 233rd report, Para. 668; ILO, 1983b, 226th report, Para. 343; and ILO, 1996d, note to Para. 492).

Finally, it should be noted that, among the categories of public servants who do not exercise authority in the name of the state, those who carry out an essential service in the strict sense of the term may be excluded from having recourse to strike action. This concept will be examined in the following paragraphs.

The Committee of Experts shares the principles of the Committee on Freedom of Association regarding situations in which the right to strike is severely restricted or even prohibited. In this connection, the Committee of Experts has observed that "a too broad definition of the concept of public servant is likely to result in a very wide restriction or even a prohibition of the right to strike for these workers" (ILO, 1994a, Para. 158). The Committee has pointed out that one of the main difficulties is due to the fact that the concept itself varies considerably from one legal system to another. For example, the terms *civil servant, fonctionnaire* and *funcionario* are so far from having the same coverage; furthermore, an identical term used in the same language does not always mean the same thing in different countries; lastly, some systems classify public servants in different categories, with different status, obligations and rights, while such distinctions do not exist in other systems or do not have the same consequences.

The Committee has considered that although it cannot overlook the special characteristics and legal and social traditions of each country, it must endeavour to establish fairly

uniform criteria in order to examine the compatibility of legislation with the provisions of Convention No. 87. for this reason it has judged it futile to try to draw up exhaustive and universally applicable list of categories of the public servant who should enjoy the right to strike or be denied such a right given that they exercise authority in the name of the state the Committee is aware of the fact that except for the group falling clearly into one category or another, the matter will frequently be one of degree. For this reason, in borderline cases, it has suggested one solution might be "not to impose a total prohibition of strikes, but rather to provide for the maintaining by a defined and limited category of staff of a negotiated minimum service when a total and prolonged stoppage might result in serious consequences for the public" (ILO, 1994a, Para. 158).

Essential services in the strict sense of the term

Overtime, the supervisory bodies of the ILO have brought greater precision to the concept of essential services in the strict sense of the term (for which strike action may be prohibition). In 1983, the Committee of Experts defined such services as those "the interruption of which would endanger the life, personal safety or health of the whole or part of the population" (ILO, 1983b, Para. 214). This definition was adopted by the Committee on Freedom of Association shortly afterwards.

Clearly, what is meant by essential services in the strict sense of the term "depends to a large extent on the particular circumstances prevailing in a country"; likewise, there can be no doubt that "a non-essential service may become essential if a strike lasts beyond a certain time or extends beyond a certain scope, thus endangering the life, personal safety or health of whole or part of the population" (ILO, 1996d, Para. 541). The committee on freedom of association has nonetheless given its opinion in a general manner on the essential or non-essential nature of a series of specific services.

Thus, the Committee has considered to be essential services in the strict sense, where the right to strike may be subject to major restrictions or even prohibitions, to be: the hospital sector; electrical services; water supply services; the telephone service; air traffic control (ibid., Para. 544).

In contrast, the Committee has considered that, in general, the following do not constitute essential services in the strict sense of the term, and therefore the prohibition to strike does not pertain (ibid, Para. 545).

* Radio and television;
*the petroleum sector;
*ports (loading and unloading);
*banking;
*computer services for the collection of Excise duties and taxies;
*department stores;
*pleasure parks;
*the metal sector;
*the mining sector;
*transport generally;
*refrigeration enterprise;
*hotel services;
*construction
*automobile manufacturing
*aircraft repairs;
*agricultural activities;
*the supply and distribution of foodstuffs;
*the mint;
*the government printing services
*the state alcohol, salt and tobacco monopolies
*the education sector
*metropolitan transport;
*postal services;

These few examples do not represent and exhaustive list of essential services. The Committee has not mentioned more services because its opinion is dependent on the nature of the specific situations and on the context which it has to examine and because complaints are rarely submitted regarding the prohibition of strikes in essential services.

Obviously, the Committee on Freedom of Association's list of non-essential services is not exhaustive. Attention should in all events be drawn to the fact that, in examining a compliant which did not involve an essential service, the Committee maintained that the possible long-term serious consequences for the national economy of a strike did not justify its prohibition (ILO, 1984b, 234th report, Para. 190)

Furthermore, pursuant to its examination of particular national legislations, the Committee on Freedom of Association has recommended that amendments should be introduced in order to prohibit only strikes in the essential services in the strict sense of the term, particularly when the authorities have held discretionary powers to extend the list of essential services (ILO, 1984a, 233rd report, pares. 668 and 669).

The Committee of Experts, for its part, has stated the following:
Numerous countries have provisions prohibiting or limiting strikes in essential services, a concept which varies from one national legislation to another. They may range from merely a relatively short limitative enumeration to a long list which is included in the law itself. Sometimes the law includes definitions, from the most restrictive to the most general kind, covering all activities which the government may consider appropriate to include all strikes which it deems detrimental to public order, the general interest or economic development. In extreme cases, the legislation provides that a mere statement to this effect by the authorities suffices to justify the essential nature of the service. The principle whereby the right to strike may be limited or even prohibit in essential services would lose all meaning if national legislation defined these services intoo broad a manner. As an exception to the general principle of the right to strike, the essential services in which this principle may be entirely or partly waived should be defined restrictively: the Committee therefore considers that essential services are only those the interruption of which would endanger the life, personal safety or health of the whole or part of the population. Furthermore, it is of the opinion that it would not be desirable –or even possible –to attempt to draw up a complete and fixed list of services which can be considered as essential.

While recalling the fundamental importance which it attaches to the universal nature of standards, the Committee considers that account must be taken of the special circumstances existing in the various member states, since the interruption of certain services which in some countries might at worst cause economic hardship could prove disastrous in other countries and rapidly lead to conditions which might endanger the life, personal safety and health of the populations. A strike in the port or maritime transport

services, for example, might more rapidly cause serious disruptions for an island which is heavily dependent on such services to provide basic supplies to its population than it would for the country on a continent. Furthermore, a non-essential service in the strict sense of the term may become essential if the strike affecting it exceeds a certain duration or extent so that the life, personal safety or health of the population are endangering (for example, in household refuse collection services). In order to avoid damages which are irreversible or out of all proportion to the occupational interests of the parties to the dispute, as well as damages to third parties, namely the users or consumers who suffer the economic effects of collective disputes, the authorities could establish a system of minimum service in other services which are of public utility ("services d'utility publique") rather than impose an outright ban on strikes, which should be limited to essential services in the strict sense of the term (ILO, 1994a, pares. 159 and 160)

Terminological clarification regarding the concept of essential service and minimum service

Before proceeding further, it would be useful to clarify particular terminological points, since a full understanding of the supervisory bodies' principles regarding the so-called essential services may otherwise not be assured. In some countries, the concept of essential services is used in legislation to refer to services in which strikes are not prohibited but where a minimum operational service may be required: in other countries, the idea of essential services is used to justify substantial restrictions, and even prohibition of strike action. When formulating their principles, the ILO supervisory bodies define the expression "essential services" in the latter sense. They also employ an intermediate concept, between essential services (where strikes may be prohibited) and non-essential services (where they may not be prohibited), which is services of "fundamental importance"(Committee of Expert terminology) or of "public utility" (Committee of Expert terminology),where the ILO supervisory body consider that strikes may not be banned but a system of minimum service may be imposed for the operation of the undertaking or institution in question. In this regard, the Committee of Experts has stated that because of diversity of terms used in national legislation and texts on the

subject, some confusion has sometimes arisen between the concepts of minimum service and essential services; they must therefore be defined very clearly.

When the Committee of Experts uses the expression" essential services" it refers only to essential services in the strict sense of the term (i.e. those the interruption of which endanger the life, personal safety or health of the whole or part of the population), in which restrictions or even a prohibition may be justified, accompanied, however, by compensatory guarantees. Nevertheless, a "minimum service" "would be appropriate in situations in which a substantial restriction or total of strike action would not appear to be justified and where, without calling into question the right to strike of the large majority of workers, one might consider ensuring that users' basic needs are met and that facilities operate safely or without interruption"(ibid, para.162). Specially, the Committee considers this type of minimum service might be established in services of public utility (ibid, para.179) In deed, "nothing prevents authorities, if they consider that such a solution is more appropriate to national conditions, from establishing only minimum service sectors considered as "essential" by the supervisory bodies according to the criteria set forth above, which justify wider restrictions to or even a prohibition of strikes" (ibid, para.162). Situations in which the supervisory authorities consider a minimum service may be imposed are described below.

Compensatory guarantees for workers deprived of the right to strike When a country's legislation deprives public servants who exercise authority in the name of the State or workers in essential services of the right to strike, the Committee on Freedom of association has stated that the workers who thus lose an essential means of defending their interests should be afforded appropriate guarantees to compensate for this restriction(ILO,1996d,para.546) In this connection, the Committee has stated that a prohibition to strike in such circumstances should be "accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented"(ibid, para,547). The Committee on Freedom of Association has stated that it is essential that" all the members of the bodies entrusted with such functions should not only be strictly impartial but, if the confidence of both sides, on which the

successful outcome even of compulsory arbitration really depends, is to be gained and maintained, they should also appear to be impartial both to the employers and to the workers concerned"(ibid, para.549.

The Committee of Experts has adopted a similar approach in stating that:
If the right to strike is subject to restrictions or a prohibition, workers who are thus deprived of an essential means of defending their socio-economic and occupational interests should be afforded compensatory guarantees, for example conciliation and mediation procedures leading, in the event of a deadlock, to arbitration machinery seen to be reliable by the parties concerned. It is essential that the latter be able to participate in determining and implementing the procedure, which should furthermore provide sufficient guarantees of impartiality and rapidity; arbitration awards should be binding on both parties and once issued should be implemented rapidly and completely(ILO,1994a, para.164).

Acute national emergency

The Committee on Freedom of Association considers a general prohibition of strikes can be justified "in the event of an acute national emergency"(ILO,1996d, para.527). Clearly, this concept applies only in exceptional circumstances, for example, against the backdrop of an attempted *coup d'e'tat* against the constitutional government, which gave rise to a state of emergency (ibid, paras.528-530). The Committee of Experts also considers prohibition of recourse to strike action can be justified in case of an acute national crisis and then, only for limited period and to the extent necessary to meet the requirements of the situation. The Committee has emphasized that "this means genuine crisis situations, such as those arising as a result of a serious conflict, insurrection or natural disaster in which the normal conditions for the functioning of society are absent"(ILO, 1994a, para.152).

Conditions for the exercising the right to strike

In most cases, the law lays down a series of conditions or requirements that must be met in order to render a strike lawful. The Committee on Freedom of association has specified that such conditions "should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union

organizations"(ILO,1996d, para.498). The large number of Committee decisions in this connection may be attributed to the fact that some 15 percent of the cases submitted to it concern the exercise of the right to strike.

The Committee on Freedom of Association has accepted the following prerequisites:

1. the obligation to give prior notice(ibid, paras.502-504)
2. the obligation to have recourse to conciliation, mediation and (voluntary) arbitration procedures in industrial disputes as a prior condition to declaring a strike, provided that the proceedings are adequate, impartial and speedy and that the parties concerned can take part at every stage(ibid, paras.500-501);
3. the obligation to observe a certain quorum and to obtain the agreement of a specified majority(ibid,paras.506-513);
4. the obligation to take strike decisions by secret ballot(ibid, paras 503 and 510)
5. the adoption of measures to comply with safety requirements and for the prevention of accidents(ibid, paras. 554 and 555);
6. the establishment of a minimum service in particular cases(ibid, paras.556-558); and
7. the guarantee of freedom to work for non-strikers(ibid. para 586).

Some of these prerequisites merit further study since, over the years, the Committee on Freedom of association and the Committee of experts has adopted principles which restrict their scope, such as recourse to conciliation. Mediation and arbitration; the necessary quorum and majority required to permit an assembly to declare a strike, and the establishment of a minimum service.

Conciliation, mediation and voluntary arbitration

As stated previously, the Committee on Freedom of Association accepts that provision may be made for recourse to conciliation, mediation and (voluntary) arbitration procedures in industrial disputes before a strike may be called, provided that they are adequate, impartial and speedy and that the parties involved can take part at every stage.

The Committee of Experts has emphasized that:

In a large number of countries legislation stipulates that the conciliation and mediation procedures must be exhausted before a strike may be called. The spirit of these provisions is incompatible with Article 4 of Convention No. 98, which encourages the full development and utilization of machinery for the voluntary negotiation of collective agreements. Such machinery must, however, have the sole purpose of facilitating bargaining: it should not be so complex or slow that a lawful strike becomes impossible in practice or loses its effectiveness (ILO, 1994a, para.171)

It should here be mentioned that Voluntary Conciliation and arbitration Recommendation, 1951(No.92), advocates that if a dispute has been submitted to conciliation procedure or arbitration for final settlement with the consent of all parties concerned, the latter should be encouraged to abstqain from strike and lockouts while the conciliation procedure or arbitration is in progress and, in the latter case, to accept the arbitration award (ILO, 1996a, p.660)

Compulsory arbitration

The Committee on Freedom of Association' position regarding compulsory arbitration is clear: it is only acceptable in cases of strikes in essential services in the strict sense of the term, in a case of acute national crisis, or in the public service:

> Compulsory arbitration to end a collective labour disputes and a strike is acceptable *if it is at the request of both parties* involved in a dispute, or if the strike in question may be restricted, even banned, i.e. in the case of disputes in the *public service* involving public servants exercising authority in the name of the state or in *essential services* in the strict sense of the term, namely those services whose interruption would endanger life, personal safety or health of the whole or part of the population (ILO,1996d, Para. 515)

Generally, the Committee is opposed to the substitution by legislative means of binding arbitration, at the initiative of the authorities or one party, for the right to strike as a means of resolving labour disputes. Apart from cases in which compulsory arbitration is acceptable, "it would be contrary to the right of workers' organizations to organize their activities and formulate their programmes, as laid down in article 3 of convention No. 87" (ILO, 1984c, 236th Report, Para. 144).

Two observations should be made regarding the Committee's position on arbitration. Firstly, according to these principles, compulsory arbitration is acceptable as long as it is provided for in the collective agreement as a means of settling disputes, or that it is approved by the parties during bargaining carried out regarding the problems which gave rise to the industrial dispute in question. Secondly, since the Committee's principles are couched in general terms, they are applicable at all stages of a dispute.

In other words, legislation cannot impose compulsory binding arbitration as a replacement for strike action, either at the outset or during the course of an industrial dispute, except in the case of an essential service, or when a non-essential service is interrupted for so long that it endangers the life, safety or health of the whole or part of the population (and that the non-essential service thereby becomes essential), or- as recently pointed out by the Committee, invoking the view of the Committee of Experts- when, after protracted and fruitless negotiations, it is obvious that the deadlock in bargaining will not be broken without some initiative on the part of the authority.

The Committee of Experts has stated that some confusion arises at times as to the exact meaning of the term "compulsory arbitration". If that term refers to the compulsory effects of an arbitration procedure resorted to voluntarily by both parties, this does not raise difficulties in the Committee opinion since parties should normally be deemed to accept to be bound by the decision the arbitrator or arbitration board they have freely chosen. The real issue arises in practice in the case of compulsory arbitration which authorities may impose in an interest dispute at the request of one party, or at their initiative (ILO, 1994a. 256).

As regards arbitration imposed by the authorities at the request of one party, the Committee considers that it is generally contrary to the principle of the voluntary negotiation of collective agreements established in Convention No. 98, and thus the autonomy of bargaining partners. An exception might, however, be made in the case of provisions which, for instance, allow workers' organizations to initiate such a procedure on their own, for the conclusion of a first collective agreement. As experience shows that first collective agreements are often one of the most difficult steps in establishing a sound bargaining relationship, these types of provisions may be said to be in the spirit of machinery and procedures which facilitate collective bargaining.

As regards arbitration imposed by the authorities at their own initiative, the Committee considers that it is difficult to reconcile such interventions with the principle of the voluntary nature of negotiation established in Article 4 of Convention No. 98. However, it has to recognize that there comes a time in bargaining where, after protracted and fruitless negotiations, the authorities might be justified to step in when it is obvious that the deadlock in bargaining will not be broken without some initiative on their part. In view of the wide variety of legal frameworks (completed through national case-law and practice) established in the various member states to address what constitutes one of the most difficult problems of industrial relations, the Committee would only give some general guidance in this respect and suggest a few principles that could be implemented through "measures adapted to national conditions", as contemplated in Article 4 of the Convention.

In the Committee's opinion, it would be highly advisable that the parties be given *every* opportunity to bargain collectively, during a sufficient period with the help of independent facilitators (mediator, conciliator, etc.) and machinery and procedures designed with the foremost objective of facilitating collective bargaining. Based on the premise that a negotiated agreement, however unsatisfactory, is to be preferred to an imposed solution, the parties should always retain the option of returning voluntarily to the bargaining table, which implies that whatever disputes settlement mechanism is adopted should incorporate the possibility of suspending the compulsory arbitration process, if the parties want to resume negotiations (ibid., paras. 257-259)

Quorum and majority for declaring strikes

Regarding the quorum and requisite majority for taking strike decisions, the Committee on Freedom of Association has adopted criteria in response to the complaints submitted to it: it has indicated, for example, that the observance of "a quorum of two- thirds of the members may be difficult to reach, in particular trade union have large numbers of members covering a large area" (ILO, 1996d, Para. 511). With regard to the number of votes required for the calling of the strike, the Committee has pointed out that the prerequisite of two-third of the total number of members of the union or branch concerned constitutes an infringement of Article 3 of Convention No. 87 (ibid., Para. 506). In contrast, the Committee has considered to be in conformity with the principles of freedom of association a situation where the decision to call a strike in the local branches of a trade union organizations may be taken by the general assembly of the local branches, when the reason for the strikes is of a local nature and where, in the higher-level trade union organizations, the decision to call a strike may be taken by the executive committee of these organizations by an absolute majority of all the members of the committee (ibid., Para. 513). Obviously, these principles were formulated in connection with specific legislation and are mentioned here by the way of example, without detriment to the legitimacy of other systems of the quorum and majority.

More recent decisions by the Committee reflect a more general approach:

The requirement of a decision by over half of all the workers involved in order to declare a strike is excessive and could excessively hinder the possibilities of carrying out a strike, particularly in large enterprises.

The requirement that an absolute majority of workers should be obtained for the calling of a strike may be difficult, especially in the case of unions which group together a large number of members. A provision requiring an absolute majority may, therefore, involve the risk of seriously limiting the right to strike (ibid., paras. 507 and 508)

The Committee of Experts has confirmed that:

In many countries legislation subordinates the exercise of the right to strike to prior approval by a certain percentage of workers. Although this requirement does not, in principal, raise problems of compatibility with the Convention, the ballot method, the quorum and the majority required should not be such that the exercise of the right to strike becomes very difficult, or even impossible in practice. The conditions established in the legislation of different countries vary considerably and their compatibility with the Convention may also depend on factual element such as the scattering or geographical isolation of work centers or the structure of collective bargaining (by enterprise or industry), all of which require an examination on a case by case basis. If a member state deems it appropriate to establish in its legislation provisions which require a vote by workers before a strike can be held, it should ensure that account is taken only of the votes cast, and that the required quorum and majority are fixed at a reasonable level(ILO, 1994a, Para. 170).

Freedom to work for non-strikers

The Committee on Freedom of Association recognizes the principle of the freedom to work of non-strikers (ILO, 1996d, Para. 586; ILO, 1998c, 310th Report, Paras. 496 and 497); the Committee of Experts appears to accept this principle when, in connection with strike picketing, it emphasizes that such action should be peaceful and should not lead to acts of violence against persons (ILO, 1994a, para. 174)

Situations in which a minimum service may be imposed

The Committee on Freedom of Association holds that a "minimum safety service" may be imposed in all cases of strike action in order to ensure the safety of persons, the prevention of accidents and the safety of machinery and equipment (ILO, 1996d, Paras. 554 and 555). Where "minimum operational services" are concerned, that is, those intended to maintain a certain level of production or services of the company or institution in which the strikes takes place, the Committee on Freedom of Association has stated that:

The establishment of minimum services in the case of strike should only be possible in: (1) services the interruption of which would endanger the life, personal safety or health of the whole or part of the population (*essential services in the strict sense of the term*); (2) services which are not essential in the strict sense of the term but where the extent and duration of a strike might be such as to result in an *acute national crisis* endangering the normal living conditions of the population; and (3) *public services of fundamental importance (ibid., Para. 556).*

For example, the Committee has stated that minimum operational services may be established, for example, for ferry services on islands; the services provided by the National Ports Enterprise; the underground transport service; the transportation service of passengers and commercial goods; rail transport service; postal services; banking; the oil sector and the national Mint (some of these examples appear in ibid., paras. 563to 568)

As regards the determination of minimum services to be maintained and the minimum number of workers providing them, the Committee on Freedom of Association has considered that this should involve not only the public authorities, but also the relevant employers' and workers' organizations. This not only allows a careful exchange of view points on what in a given situation can be considered to be the minimum services that are strictly necessary, but also contributes to guaranteeing that the scope of the minimum service does not result in the strike becoming ineffective in practice because of its limited impact, and to dissipating possible impressions in the trade union organizations that the strike has come to nothing because of over-generous and unilaterally fixed minimum services. The Committee has pointed out that it is important for provisions regarding the minimum service to be maintained… to be established clearly to be applied strictly and made known to those concerned in due time (ibid., Paras. 560 and 559)

In the event of a strike in public services, if there is any disagreement between the parties as to the number and duties of the workers concerned in a minimum service, the Committee is of the opinion that "the legislation should provide for any such

disagreement to be settled by an independent body and not by the ministry of labour, or the ministry of public enterprises concerned" (ibid., Para. 561)

In connection with consideration after a strike of whether the minimum services were excessive because they went beyond what was indispensable, the Committee has stated that "a definitive ruling made in full knowledge of the facts-can be pronounced only by the judicial authorities, in so far as it depends, in particular, upon a thorough knowledge of the structure and function of the enterprises and establishments concerned and of the real impact of the strike action"(ibid.,para.562).

The Committee of Experts' position regarding a minimum operational service (which it accepts in essential services in the strict sense of the term- when legislation does not ban strike action but imposes a minimum service- and, in all events, in all companies and institutions which provide "services of public utility") features in the final part of the section in this article on terminological clarifications concerning essential services. This is developed the following paragraph:

In the view of the Committee, such a service should meet at least two requirements. Firstly, and this aspect is paramount, it must genuinely and exclusively be a *minimum* service, that is, one which is limited to the operations which are strictly necessary to meet the basic needs of the population or the minimum requirements of the service, while maintaining the effectiveness of the pressure brought to bear. Secondly, since this system restricts one of the essential means of pressure available to workers to defend their economic and social interests, their organizations should be able, if they wish, to participate in defending such a service, along with employers and the public authorities. It would be highly desirable for negotiations on the definition of the organization of the minimum service not to be held during a labour dispute, so that all parties can examine the matter with the necessary objectivity and detachment. The parties might also envisage the establishment of a joint or independent body responsible for examining rapidly and without formalities the difficulties raised by the definition and application of such a minimum service and empowered to issue enforceable decisions (ILO, 1994a, Para. 161)

Declaration of the illegality of a strike for failure to comply With legal requirements

Upon its examination of allegations regarding the declaration of illegality of a strike, the Committee on Freedom of Association has emphasized that responsibility for declaring a strike illegal should not lie with the government, but with an independent body which has the confidence of the parties to the dispute (ILO, 1996d, paras. 522 and 523). As regards an official circular concerning the illegality of any strike in the public sector, the Committee has considered that "such matters are not within the competence of the administrative authority" (ibid. Para. 525).

Strikes, collective bargaining and "social peace"

In practice, strikes may or may not be linked to a bargaining process intended to lead to a collective agreement. In connection with strikes for which collective bargaining is the point of reference, the Committee on Freedom of Association has stated that "*strikes decided systematically long before negotiations take place do not fall within the scope of* the principales of the freedom of associations" (ibid., para. 488). Moreover, as regards strikes concerning the level at which negotiations are conducted, the Committee has stated that:

Provisions which prohibit strikes if they are concerned with the issue of whether a collective employment contract will bind more than one employer are contrary to the principles of freedom of association on the right to strike; workers and their organizations should be able to call for industrial action in support of multi-employer contracts.

Workers and their organizations should be able to call for industrial action (strikes) in support of multi-employer contracts (collective agreements) (ibid. , paras. 490 and 491)

On the other hand, the Committee has also considered acceptable a temporary restriction on strikes under "provisions prohibiting strike action in breach of collective agreements" (ILO, 1975, 14th report, Para. 167). It has also considered that, since the solution to a

legal conflict as a result of a difference in interpretation of a legal text should be left to the competent courts, the prohibition of strikes in such a situation does not constitute a breach of freedom of association (ILO, 1996d, Para. 485).

None the less, as stated previously, the Committee on Freedom of Association considers the right to strike should not be limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement: "workers and their organizations should be able to express in a border context, if necessary, their dissatisfaction as regards economic and social matters affecting their members' interests" (ibid., Para. 484). Likewise, the Committee on Freedom of Association has stated that "a ban on strike action not linked to a collective dispute to which the employee or union is party is contrary to the principals of freedom of association" (ibid., Para.489). The Committee of Experts' approach is similar, as was apparent in the sections dealing with political strikes and sympathy strikes.

The Committee of Experts has dealt in greater detail that the Committee on Freedom of Association with the matters raised by collective bargaining systems which provide for social peace while the collective agreement, or guidelines established by judicial decisions or arbitration awards:

The legislation in many countries does not establish any restrictions on the time when a strike may be initiated, stipulating only that the advance notice established by the law must be observed. Other industrial relations systems are based on a radical different philosophy in which collective agreements are seen as a social peace treaty of fixed duration during which strikes and lockouts are prohibited under the law itself, with workers and employers being afforded arbitration machinery in exchange. Recourse to strike action is generally possible under these systems only as a means of pressure for the adoption of an initial agreement or its renewal. The Committee considers that both these options are compatible with the Convention and that the choice should be left to the law and practice of each state. In both types of systems, however, workers' organizations should not be prevented from striking against the social and economic policy of the

government, in particular where the protest is not only against that policy but also against its effects on some provisions of collective agreements (for instance, the impact of a wage control policy imposed by the government on monetary clauses in the agreement). If legislation prohibits strikes during the term of collective agreements, this major restriction on the basic right of workers' organizations must be compensated by the right to have recourse to impartial and rapid arbitration machinery for individual or collective grievances concerning the interpretation or application of collective agreements. Such a procedure not only allows the inevitable difficulties of application and interpretation to be settled during the term of an agreement, but has the advantage of clearing the ground for subsequent bargaining rounds by identifying the problems which have arisen during the term of the agreement (ILO, 1994a, paras. 166 and 167).

Protection against acts of anti-union
Discrimination in connection with strikes

When a conflict of interests between employers and workers is not resolved through bargaining or arbitration, the conflict between the parties may lead to collective action in efforts to ensure that their respective interests prevail. At this point, the conflict enters a phase of entrenchment during which reprisals may occur and the rules of play be broken, going so far as to include violations of the law.

In connection with complaints submitted to it, the Committee on Freedom of Associations has frequently examined allegations of reprisals against strikes in the form of dismissals of trade union officials, members or workers or other types of detrimental acts at work, for organizing or simply participating in legitimate strikes.

The Committee of Experts has emphasized that "the protection afforded to workers and trade union officials against acts of anti-union discrimination constitutes an essential aspect of freedom of association, since such acts may result in practice in denial of the guarantees laid down in Convention No. 87" (ibid., Para. 202). The following paragraphs will examine the ILO standards which protect against anti-union discrimination and the

principles laid down by the supervisory bodies regarding the persons who should enjoy protection against such forms of discrimination, the different acts of discrimination and the requisite features of compensation mechanisms.

International labour standards regarding anti-union Discrimination

Although no specific provisions exist to protect against acts of discrimination in connection with strikes, protection against any act of discrimination which undermines freedom of associations in respect of employment is guaranteed primarily under the Right to Organize and Collective Bargaining Convention, 1949(No. 98), together with the workers' representatives Convention, 1971 (No.135), and the labour relations (public service) Convention, 1978 (No. 151).

Article 1, paragraph 1, of Convention No. 98 states, in general terms, that "workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment" (ILO,1996a, p. 639)

Article 1, of Convention No. 135 states that:

Workers' representative in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements (ILO, 1996b, p. 495).

Article 4 of Convention No. 151 states that:

1. public employees shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment

2. such protection shall apply more particularly in respect of acts calculated to

(a) make the employment of public employees subject to the condition that they shall not join or shall relinquish membership of a public employees' organization;

(b) cause the dismissal or otherwise prejudice a public employee by reason of member-

ship of a public employees' organization or because of participation in the normal activities of such an organization (ILO, 1996c, pp. 48-49)

Other Conventions and Recommendations also contain provisions relating to anti-union discrimination in employment and the carrying out of union activities; these provisions basically re-state those laid down in the Conventions on freedom of association, adapted to specific situations and workers. Furthermore, Article 1, subparagraph (d), of the Abolition of Forced Labour Convention, 1957 (N. 105), prohibits any form of forced or compulsory labour "as a punishment for having participated in strikes" (ILO, 1996b, p. 89).

The Committee of Experts has emphasized the differences existing in legislation in ILO member states regarding guarantees against anti-union discrimination. It has stated, specifically, that in several countries, workers covered by general labour law are protected against acts of anti-union discrimination, but that in others legislation provides no general protection in this respect or denies it directly or indirectly to certain categories of workers (ILO, 1994a, p. 206). Some legislation grants special protection to certain persons, for example, to the members of a trade union which has applied for registration or which is in the process of being established, or to trade union officers and leaders (ibid. Para. 207).

On the specific question of the right to strike, the Committee of Experts has observed that: "since the maintaining of the employment relationship is the normal consequence of recognition of the right to strike, its exercise [legal exercise, be it understood] should not result in workers being dismissed or discriminated against" (ibid. Para. 179).

Persons protected and types of act of anti-union

Discrimination in strikes contexts

The principles upheld by the Committee on Freedom of Association consider illegitimate any discrimination act against union leaders for organizing legitimate strikes; such protection also covers trade union members and workers who participate in strikes. Specifically, the Committee supports the general principle that "no person shall be prejudiced in his employment by reason of his employment by reason of his trade union membership or legitimate trade union activities whether past or present" (ILO, 1996d, Para. 690).

In practice, the Committee has maintained that:

- No one should be penalized for carrying out or attempting to carry out a legitimate strike (ibid., Para.590);
- The dismissal of workers because of a strike, which is a legitimate trade union activity, constitutes serious discrimination in employment is contrary to Convention No. 98 (ibid., Para. 591);
- When trade unionists or union leaders are dismissed for having exercised the right to strike, the Committee can only conclude that they have been punished for their trade union activities and have been discriminated against (ibid., Para. 592)
- Respect for the principles of freedom of association requires that workers should not be dismissed or refused re-employment on account of their having participated in a strike or other industrial action. It is irrelevant for these purposes whether the dismissal occurs during or after the strike. Logically, it should be irrelevant that the dismissal takes place in advance of a strike, if the purpose of the dismissal is to impede or penalize the exercise of the right to strike (ibid., Para. 593);
- The use of extremely serious measures, such as dismissal of workers for having participated in a strike and refusal to re-employ that, implies a serious risk of abuse and constitutes a violation of freedom of association (ibid., Para. 597);

- No one should be deprived of their freedom or be subject to penal sanctions for the mere fact of organizations or participating in a peaceful strike (ibid. Para. 602).

The Committee of Experts has also affirmed the protection of workers and union officials against acts of anti-union discrimination and has confirmed that most national legislation contains general or detailed provisions which protect workers against acts of discrimination, although the level of protection may vary. The Committee emphasizes that this protection "constitutes an essential aspect of freedom of association" (ILO, 1994a para.202) and, in its opinion, "is particularly desirable for trade union officers and representatives, because in order to be able to perform their trade union duties in full independence they must have the guarantee that they will not be prejudiced on account of their trade union office" (ibd., para.207). This opinion coincides with that of the Committee on Freedom of Association (ILO, 1996d, para. 724)

As stated previously, regarding the right to strike, the Committee of Experts has emphasized that the maintaining of the employment relationship is a normal legal consequence of recognition of the right to strike and that dismissals against strikers should not ensure from the exercise of this right. The Committee recalls that:

[…] in some countries with the common-law system strikes are regarded as having the effect of terminating the employment contract, leaving employers free to replace may dismiss strikers with new recruits. In other countries, when a strike takes place employers may dismiss strikers or replace them temporarily or for an indeterminate period. Furthermore, sanctions or redress measures are frequently inadequate when strikers are singled out through some measures taken by the employer (disciplinary action, transfer, demotion, dismissal); this raises a particularly serious issue in the case of dismissal, if workers may only obtain damages and not their reinstatement. In the Committee's view, legislation should provide for genuine protection in this respect, otherwise the right to strike may be devoid of content (ILO, 1994a, Para. 139)

The Committee on Freedom of Association has stated its concern with regard to legislation in particular countries which permits dismissal without an indication of motive:

It would not appear that sufficient protection against acts of anti-union discrimination, as set out in Convention No. 98, is granted by legislation in cases where employers can in practice, on condition that they pay the compensation prescribed by law for cases of unjustified dismissal, dismiss any worker if the true reason is the worker's trade union membership or activities (ILO, 1996, Para. 707)

The Committee of Experts has expressed a similar view in referring to appropriate protection that should be enjoyed by workers against acts of anti-union discrimination in general, according to Article 1 of Convention No. 98 (ILO, 1994a, Para. 220). Similarly, when considering the possibility that trade union leaders could be dismissed without an indication of the motive, the Committee on Freedom of Association, in its consideration of the case, requested the government to take steps "with a view to punishing acts of anti-union discrimination and making appeal procedures available to the victims of such acts" (ILO, 1996d, Para. 706).

From the complaints submitted to it, the Committee on Freedom of Association has identified acts of anti-union discrimination due to legitimate strike action, including dismissal, the practice of blacklisting of persons who have participated in strikes (particularly with a view to refusing to hire them), the transfer of trade union officials, the need for "certificates of loyalty" if workers are to be engaged or retained in service, demotion, compulsory early retirement, penal sanctions and other acts (ibid., paras. 702-722).

Protection machinery

In the view of the Committee on Freedom of Association, "as long as protection against anti-union discrimination is in fact ensured, the methods adopted to safeguard workers against such practices *may vary from one state to another*" (ibid., Para. 737). Similarly,

the Committee of Experts has stated that protection against acts of anti-union discrimination may "take various forms adapted to national legislation and practice, provided that they prevent or effectively redress anti-union discrimination, and allow union representatives to be reinstated in their posts and continue to hold their trade union office according to their constitutes' wishes" (ILO, 1994a, Para. 214).

The Committee of Experts has noted, by way of example, that in order to guarantee the protection of trade union officials in some cases legislation establishes preventive machinery by requiring that certain measures taken against trade union representatives or officials must first be authorized by an independent body or public authority (labour inspectorate or industrial tribunals), a trade union body or works council. In most legislation, however, the emphasis is laid on compensation for the prejudice suffered (ibid., Para.215). The Committee on Freedom of Association has pointed out that "one way to ensuring the protection of trade union officials is to provide that these officials may not be dismissed, either during their period of office or for certain period thereafter except, of course, for serious misconduct" (ILO, 1994a, Para. 727)

The Committee of Experts has stressed that anti-union dismissal cannot be treated in the same way as other kinds of dismissal, because freedom of association is a fundamental right. In the view of the Committee, this means that certain distinctions must be made, for example as regards conditions as to proof, sanctions and remedies (ILO, 1994a, Para. 202).

In this regard, the Committee on Freedom of Association has pointed out that:

The existence of basic legislative provisions prohibiting acts of anti-union discrimination is not sufficient if these provisions are not accompanied by effective procedures ensuring their application in practice. Thus, for example, it would often be difficult, if not impossible, for a worker to furnish proof an act of anti-union discrimination of which has been the victim. This shows the full importance of Article 3 of Convention No. 98, which

provides that machinery appropriate to the national condition shall be established where necessary, to ensure respect for the right to organize (ILO, 1996d, Para.740).

The supervisory bodies have also frequently and in a decisive manner demonstrated their concern regarding situations in which the measures taken to eliminate or prevent acts of anti-union discrimination have proved to be ineffectual or insufficient persuasive or where the examination of complaints in this regard has been insufficiently expeditious. In this connection, the Committee on Freedom of Association has stated that:

- Respect for the principals of freedom of association clearly requires that workers who consider that they have been prejudiced because of their trade union activities should have access to *means of redress* which are *expeditious, inexpensive* and fully impartial (ibid., para. 741)

- Legislation must make express provisions for *appeals* and established *sufficiently dissuasive sanctions* against acts of anti-union discrimination to ensure the practical application of Articles 1 and 2 of Convention No. 98 (ibid. Para. 743).

Furthermore, in the light of excessive slowness- sometimes years- by the legal system in dealing with disciplinary sanctions against trade unions, the Committee on Freedom of Association has stated that:

Cases concerning anti-union discrimination contrary to Convention No.98 should be *examined rapidly*, so that the necessary remedies can be really effective. An excessive delay in processing cases of anti-union discrimination, and particularly a lengthy delay in concluding the proceedings concerning the reinstatement of the trade union leaders dismissed by the enterprise, constitute a denial of justice and therefore a denial of the trade union rights of the persons concerned (ibid., Para. 749).

The Committee of Experts has in its turn stressed that "the existence of general legal provisions prohibiting acts of anti-union discrimination is not enough if they are not

accompanied be effective and rapid procedures to ensure their application in practice" (ILO, 1994a,Para. 214)

Whether the machinery is based on prevention or compensation, experience has shown that similar problems arise in practice and concern in particular the slowness of the proceedings, the difficulties relating to the burden of proof and the possibility for the employer to acquit himself by paying compensation which bears no proportion to the seriousness of the prejudice suffered by the worker. The Committee therefore emphasizes the necessity of providing expeditious, inexpensive and impartial means of preventing acts of anti-union discrimination or resolving them as quickly as possible (ibid., Para. 216).

Legislative provisions are insufficient if they are not accompanied by sufficiently dissuasive sanctions to ensure their practical application. Similarly, the Committee of Experts considers that "the reinstatement of the dismissed worker, including retroactive compensation, [is] the most appropriate remedy in such cases of anti-union discrimination" (ibid. para. 224). The Committee on Freedom of Association has also stated that job reinstatement should be available to those who were victims of anti-union discrimination (ILO, 1996d, Para. 755).

Abuses in exercising the right to strike

The right to strike, which is held by the ILO supervisory bodies to be fundamental, is not an absolute right and its exercise should be in line with the other fundamental right of citizens and employers. Consequently the principles of the supervisory bodies cover only legal strikes, that is, strikes which are carried out in compliance with national legislation where this does not undermine out in compliance with the national legislation where this does not undermine the basic guarantee of the right to strike as have been described in the preceding sections on the principles of freedom of association in connection with strikes. Indeed, as the Committee on Freedom Association has stated, "the conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and in

any event not such as to place a substantial limitation on the means of action open to trade union organizations" (ibid. para.498)

Abuses in the exercise of the right to strike may take different forms, ranging from its exercise by groups of workers who may be excluded from this right, or failure to comply with reasonable requirement in declaring a strike to damaging or destroying premises or property of the company and physical violence against persons.; National legislation generally provided for sanctions for such abuse which ranging from such abuses, from dismissal or financial or criminal sanctions of different types. For instance, in recent case reexamined by the committee of freedom of association in connection with strike of air traffic controller, which gave rise to dismissal and criminal proceedings, the committee considers that the government could not be asked to comply with the request for a return to work of the dismissed workers as demanded by the compliment, given that during the strike the passwords of the radar system has been changed, thereby endangering the security of the population(ILO.1998b,309th Reportpara.305.). In more general terms, in examining situations involving abuses in the exercise of the right to strike, the committee on freedom of association has decided as follows:

The principles of freedom of association do no protect abuses consisting of criminal acts while exercising the right to strike.

Penal sanctions should only be imposed as regards strikes where there are violations of strike prohibitions which are themselves in conformity with the principles freedom association. All penalties in respect of illegitimate actions linked to strikes should be proportionate to the offence or fault committed and the authorities should not have recourse to measures of imprisonment for the mere fact of organizing or participating in a peaceful strike.

The Committee considered that some of the temporary measures taken by the authorities as a result of a strike in an essential service (prohibition of the trade union activities, cessation of the check-off of the trade union dues, etc) were contrary to the guarantees provided for in Article 3 of ConventionNo.87. The Committee drew the Government's attention to the fact that the measures taken by the authorities to ensure the performance

of essential services should not be out of proportion to the ends pursued or lead to excesses (ILO,1996d.para.595-600).

In case of peaceful strikes, the Committee has stated that"the authorities should not resort to arrests and imprisonment in connection with the organization of or participation in peaceful strike: such measures entail serious risks of abuse and are a grave threat to freedom of association"(ibid., Para 601).; "no one should be deprived of their freedom or be subject to penal sanctions for the mere act of organizing or participating in peaceful strike"(ibid., Para 602).

Most legislation restricting or prohibiting the right to strike also contains clauses providing for sanctions against workers and trade unions that infringe these provisions. In some countries, striking illegally is a penal offence punishable by a fine or term of imprisonment. Elsewhere, engaging in unlawful strike may be considered as an unfair labour practice and entail civil liability and disciplinary sanctions.

The Committee of Experts considers that:

….sanctions for strike action should be possible *only* where t he prohibitions in question are in conformity with the principles of freedom of association. Even in such cases, both excessive recourse to the courts in labour relations and existence of heavy sanctions for strike action may well create more problems than they resolve. Since the application of disproportionate penal sanctions does not favour the development of harmonious and stable industrial relations, if measures of imprisonment are to be imposed at all, they should be justified by the seriousness of the offences committed. In any case, a right of appeal should exist in this respect.

In addition, certain prohibitions of, or restrictions to, the right to strike which are in conformity with the principles of freedom of association sometimes provide for civil or penal sanctions against strikers and trade unions which violate these provisions. In the view of the Committee, such sanctions should not be disproportionate in the seriousness of the violation (Ibid,.para.177and 178).

Other principles involved

Pickets

As regards the action of pickets organized in accordance with the law, the Committee of Freedom of Association considers that this " should not be subject to interference by the public authorities" and that "the prohibition of strike pickets is justified only if the strike ceases to be peaceful" (ILO,1996d, para.583 and 584). Consequently, the Committee has considered legitimate a legal provision that prohibits pickets "from disturbing public order and threatening workers who continued work." (ibid. Para 585)

Taking part in picketing and firmly but peacefully inciting other workers to keep away from their work place cannot be considered unlawful. The case is different, however, when picketing is accompanied by violence or coercion of non strikers in an attempt to interfere with their freedom to work; such acts constitute criminal offences in many countries.
The requirement that strike pickets can only be set up near an enterprise does not infringe the principle of freedom of association (ibid. paras. 586 and 587)

The Committee of Experts, after recalling that strike picketing aims at ensuring the success of the strike by persuading as many persons as possible to stay away from work, has stated that:

The ordinary or specialized courts are generally responsible for resolving problems which may arise in this respect. National practice is perhaps more important here than any other subject: while in some countries pickets are merely a means of information, ruling out any possibility of preventing non-strikers from entering the workplace, in other countries they may be regarded as a form of the right to strike, and the occupation of the workplace as its natural extension, aspects which are rarely questioned in practice, except in extreme cases of violence against persons or damage to property. The Committee

considers in this respect that restrictions on strike pickets and workplace occupational should be limited to cases where the action ceases to be peaceful (ILO, 1994a, Para. 174)

Requisitioning of workers

The requisitioning of workers of a company or institution in which a strike is taking place, that is, a back-to-work order, have been alleged on different occasions before the Committee on the Freedom of Association, which has laid down the following principles:

Whenever a total and prolonged strike in a vital sector of the economy might cause a situation in which the life, health or personal safety of the population might be endangered, a back-to-work order may be lawful, if applied to a specific category of staff in the event of a strike whose scope and duration could cause such a situation.

The use of the military and requisitioning orders to break a strike over occupational claims, unless these actions aim at maintaining essential services in circumstances of the utmost gravity, constitute a serious violation of freedom of association.

Although it is recognized that a stoppage in services or undertakings such as transport companies and railways might disturb the normal life of the community, it can hardly be admitted that the stoppage of such services could cause a state of acute national emergency. The Committee has therefore considered that measures taken to mobilize workers at the time of disputes in services of this kind are such as to restrict the workers' right to strike as a means of defending their occupational and economic interests.

The requisitioning of railway workers in the case of strikes, the threat of dismissal of strike pickets, the recruitment of underpaid workers and a ban on the joining of a trade union in order to break up lawful and peaceful strikes in services which are not essential in the strict sense of the term are not in accordance with freedom of association.

Where an essential public services, such as the telephone service, is interrupted by an unlawful strike, a government may have to assume the responsibility of assuring its functioning in the interests of the community and, for this purpose, may consider it expedient to call in the armed forces or other persons to perform the duties which have

been suspended and take the necessary steps to enable such persons to be installed in the premises where such duties are preformed (ILO, 1996d, Paras. 572, 573, 575-577).

The Committee of Experts also accepts requisitioning in circumstances of utmost gravity or to ensure the operation of essential services in the strict sense of the term; otherwise, it considers that requisitioning is to be avoided in that it could be abused as a means of settling labour disputes (ILO, 1994a, Para. 163).

Hiring of workers to replace strikers

The Committee on Freedom of Association only considers the replacement of strikers to be justified: (a) in the event of a strike in an essential service in which strikes are forbidden by law, and (b) when a situation of acute national crisis arises (ILO, 1996d, paras. 570 and 574). The Committee of Experts has considered that:

A special problem rises when legislation or practice allows enterprises to recruit workers to replace their own employees on *legal* strike. The difficulty is even more serious if, under legislative provisions or case-law, strikers do not, as of right, find their job waiting for them at the end of the dispute. The Committee considers that this type of provision or practice seriously impairs that right to strike and affects the free exercise of trade union rights (ILO, 1994a, Para. 175).

Compulsory closing down, intervention of the police,
and access by management to the enterprise

The Committee on Freedom of Association has concluded that for providing in national legislation the closing down of the enterprise, establishment or business in the event of strikes is an infringement of "the freedom of work of persons not participating in a strike and disregards the basic needs of the enterprise (maintenance of equipment, prevention of accidents and the right and the right of employers and managerial staff to enter the installations of the enterprise and to exercise their activities)." (ILO, 1998c, 310$^{th\ report}$, Para. 497).

As regards the intervention of the police during a strike, the Committee on Freedom of Association has stated the opinion that, while workers and their organizations have an obligation to respect the law of the land, the intervention by security forces in strike situations should be limited strictly to the maintenance of public order and only if there is a serious threat to law and order (ILO, 1996d, paras. 581 and 580). Similarly, in the view of the Committee, "the authorities should resort to calling in the police in a strike situation only if there is a genuine threat to public order and governments should take measures to ensure that the competent authorities receive adequate instructions that might undermine public order. The intervention of the police should limit be in proportion to the threat to public order and governments should take measures to ensure that the competent authorities receive adequate instructions so as to avoid the danger of excessive violence in trying to control demonstrations that might undermine public order" (ibid., Para. 582).

Furthermore, the Committee on Freedom of Association has concluded that requesting police assistance in order to allow access by members of management to the enterprise when occupied by strikers does not represent a violation of the principles of freedom of association. As has just been explained in connection with the compulsory closing down of the enterprise during a strike, the Committee has established the right of employers and managerial staff to enter the installations of the enterprise and to exercise their activities during a strike.

Wage deduction for days of strike action

On the subject of wage deduction for days of strike, the Committee on Freedom of Association has stated that this practice gives rise to "no objection from the point of view of freedom of association principles" (ILO, 1996d, Para. 588). None the less as to that matter of possible payment of wages to strikers, for instance, under an agreement between the parties in a recent case, the Committee asked a Government to confirm that the payment of wages to workers for the period when they have gone on strike "is neither

required nor prohibited" (ILO, 1997a, Para.223) and, after receiving this confirmation from the government against which the complaint had been lodged, the Committee did not pursue its examination of the matter(ILO,1998b,para.151). Likewise, in another case in which deductions of pay were higher than the amount corresponding to the period of the strike, the Committee recalled that the imposition of sanctions for strike action was not conductive to harmonious labour relations (ILO, 1996d, Para. 589).

The Committee of Experts has refrained from criticizing the legislation of member states which provide for wage deductions in the event of strike action and has indicated that, as regards strike pay, "in general the parties should be free to determine the scope of negotiable issues" (ILO, 1998d, p. 224).

Restrictions placed by national legislation on the exercise of the right to strike

It should first be recalled that national legislation in this area is not always respected on practice, particularly when it places substantial restrictions on basic trade union rights---- such as strike action---or if the effect of accumulated restrictive provisions render it almost impossible for workers to exercise these rights legally.

The observation on the application of Convention No.87 made by the Committee of Experts in their most recent reports (1997 and 1998) gave a broad picture of the problems concerning strikes that arise in the ratifying countries, as well as the intentions expressed by many governments to amend their legislation in order to take these principles into account (see ILO , 1997b and 1998d)

Out of a total 48 countries to which the Committee of Experts has addressed observations regarding the right to strike with in the context of Convention No. 87 (which has been ratified by 122 member states), the problems that have arisen may be summarized as follows.

Algeria: prison sentence for acts of seeking to obstruct the operation of establishments providing public services; the ministry or competent authority is empowered to refer an industrial dispute to arbitration.

Australia (federal legislation): strikes may be prohibited in cases of serious industrial disputes prejudicing or threatening trade or commerce with other countries or amongst states.

Azerbaijan: Restrictions on workers' rights to participate in collective action which disturbs transport operations, state or public institutions or undertakings, with the possibility of severe sanctions, including up to three years' imprisonment.

Bangladesh: The necessity for three –quarter of the members of a workers' organization to consent to a strike; strikes lasting over 30 days may be prohibited; strikes considered as prejudicial to the national interest or as involving a "public utility service" may be prohibited (the Government has stated it is preparing a new Labour Code to amend the legislation).

Barbados: Prison sentences or fines for breaking a contract of employment in non essential services in the strict sense, when to do so may endanger real or personal property.

Belarus: Inclusion of transport services in the list of essential services in which strikes are prohibited (the Government has stated that a Bill has been prepared to amend the legislation).

Benin: Deprivation of the right to strike when the interruption of a service would harm the economy and the higher interests of the nation (the government has reported that it is in the process of adopting a Bill amending the legislation).

Bolivia: Penal sanctions in cases of general or sympathy strikes; a majority of three-quarter of the workers required to declare a strike; strikes prohibited in banks; compulsory arbitration may be imposed by a decision of the executive authority; public servants denied the right to strike, and strikes prohibited in all public services.

Burkina Faso: workers may be requisitioned by government decision during strikes by public services.

Canada: certain categories of provincial public servants (Province of Alberatta0 who do not exercise authority in the name of the state are not allowed to strike; there are restrictions on the right to strike in the agricultural and horticultural sectors(province of Ontario) and in the railway and port sectors(federal Government)

Central African Republic: Government empowered to requisition workers during a strike when so required by the "general interest".

Colombia: Presence of the authorities at general assemblies convened to vote on referral to arbitration or on the calling of a strike; ban on strike in certain non essential services; denial of the right to strike to federations and confederations; once a strike is called, the Ministry of Labour is empowered to submit to a ballot decision whether the dispute should go to arbitration, and to impose arbitration if the strike lasts beyond a specific period(the Government has reported it has prepared a preliminary draft of a Bill to amend the legislation).

Congo: Organization by the employer of the minimum service indispensable to safeguard the general interest in case of strikes in the public service (the Government has reported its intention to amend the legislation or adopt a new text); certain restrictions on the exercise of the right to strike by public servants who do not exercise authority in the name of the State.

Costa Rica: Ban on the right to strike in the rail, maritime and air transport sector.

Cyprus: Discretionary power by the Council of Ministers to ban strikes in certain services which it considers essential but which are not so in the strict sense of the term (the Government has indicated it is examining a Bill to amend the legislation.

Djibouti: The President of the Republic has wide powers to requisition public servants in case of a strike.

Ecuador: Public servants who do not exercise authority in the name of the state are banned from striking; prison sentences for instigators of and participants in collective work stoppages; denial of the right to strike to confederations (draft amendments to the law were prepared during an ILO technical assistance mission).

Egypt: Compulsory arbitration may be imposed at the request of one party, in case of a strike.

Germany: Denial of the right to strike to public servants who do not exercise authority in the name of the state.

Guatemala: Requirement of a majority of two-thirds of the workers to call a strike; ban on strikes by agricultural workers at harvest time, with a few exceptions, and by workers in enterprises and services in which the government considers that a suspension of their work would seriously affect the national economy; detention and trial of persons calling for an illegal strike; prison sentences in the case of strikes paralyzing enterprises contributing to the development of the national economy.

Guinea: The compulsory arbitration procedure may be implemented at the request of one of the parties.

Guyana: Compulsory arbitration may be imposed in respect of strikes in public utility undertakings.

Honduras: Requirement of a majority of two-thirds of the total membership of the trade union organization in order to call a strike; ban on strikes being called by federations and confederations; the Minister of labour and social Security empowered to end disputes in services for the production, refining, transport and distribution of petroleum; requirement that any suspension or stoppage of work in public service that do no t depend directly or indirectly on the State is subject to S government authorization or to six months notice; compulsory arbitration , without the possibility of calling to strike for as long as the arbitration award is in force (two years) . For collective disputes in public services which are not essential in the strict sense of the term, such as transport services in general, and services for the production, refining, transport and distribution of petroleum (the government has indicated the existence of a preliminary draft bill to amend the legislation).

Jamaica: The Ministry is empowered to submit industrial disputes to compulsory arbitration including those in non essential services (the government has reported on the start of a process tending to amend the legislation)

Japan: Ban on the right to strike of public servants who do not exercise authority in the name of state.

Liberia: Ban on strikes.

Madagascar: Forcible requisition of workers outside cases of strikes in essential services.

Mali: In order to terminate a strike, compulsory arbitration may be imposed by decision of authorities.

Malta: Compulsory arbitration may be imposed in order to end a strike.

Mauritania: Prohibition of strikes in the case of compulsory arbitration (the government has indicated it has prepared a draft labour code to amend the legislation)

Myanmar: Denial of fundamental trade union rights, with serious restrictions on freedom of association and, consequently, on the right to strike.

Nambia : Ban on strikes in export processing zone.

Nicaragua: Collective disputes can be subjected to compulsory arbitration on 30 days after the start of a strike; for federation and confederations.

Niger: Wide requisitioning powers in case of strikes.

Norway: Compulsory arbitration may be imposed in strike in the oil industry (the government has indicated it is working on proposals for new legislation).

Pakistan: Restriction on the right to strike of public servants who do not exercise authority in he name of the state and denial of freedom of association in export processing zones; one- year prison sentence for participating in a strike in an essential service.

Peru: Imposition of compulsory arbitration in strikes in the public services, including transport; requirement that a strike call be adopted by an absolute majority of the workers (the Government has reported it is preparing various draft Bills to amend the legislation).

Philippines: Arbitration can be imposed in cases of strike affecting an industry indispensable to the national interest (the Government has reported it has prepared a draft bill to amend the legislation); penalties and prison sentences for participating in certain types of illegal strike.

Romania: Compulsory arbitration procedures at the sole initiative of the Ministry of Labour when a strike has lasted for more than 20 days and its continuation is likely to affect the interest of general economy; up to 6 months in prison and fines for organizing an illegal strike.

Rwanda: Denial of the right to strike in the in the public service including public servants who do not exercise authority in the name of the state (the government has stated it is preparing a draft amendment to the law).

Senegal: the authorities are empowered to impose compulsory arbitration if a strike is a strike is prejudicial to "public order and the general interest".

Swaziland: Prohibition, under penalty of up to five years' imprisonment, of a federation from inciting to cessation or slow-down of work; ban on strikes in the broadcasting sector, with sanctions of one year's imprisonment for the responsible leaders; power of the minister to apply to the court to enjoin any strike if he and she considers that the "national interest" is threatened; ban on sympathy strikes; strike ballots conducted by the commissioner of labour; excessive majority of workers required to call a strike; penal sanctions of from one to five years foe various "unlawful" forms of industrial action.

Switzerland: Ban on strikes by public servants who do not exercise authority in the name of the state (the Government has reported a reform of the federal constitution is being prepared)

Syrian Arab Republic: Ban on strikes in the agriculture sector.

Trinidad and Tobago: An excessive high number of workers in a bargaining unit required to call a strike; the minister of labour or one of the parties may resort to the end of a strike.

Tunisia: Obligation to obtain the approval of the central workers' union before declaring a strike.

United Kingdom: Restrictions on participation in sympathy strikes.

Yemen: Various restrictions on the right to strike, for example, the ministry of labour has the power to paralyze any action supporting trade union demands, and the obligation to obtain the approval of the federation of trade unions to conduct a strike.

The foregoing details on national legislation show that the restrictions on the right to strike most commonly occurring in the member states of the ILO having ratified Convention No. 87 are the imposition of compulsory arbitration through a decision of the authorities or at the initiative of one of the parties, even when the services concerned are not essential services in the strict sense or the public servants in question do not exercise authority in the name of the state; the imposition of penal sanctions for organizing or participating in strikes; requirement of an excessively large majority in a strike vote as a condition for the legality of a strike; a ban on strikes by public servants who do not exercise authority in the name of the state; the power to requisition striking workers and, in many countries, the ban on strikes in certain non-essential services.

Application of the legal measures imposing such restrictions on the exercise of the right to strike has caused many complaints to be brought before the committee on freedom of association. The most frequently recurring problems are the prohibition of strikes in services considered to be essential in the acceptable to the supervisory bodies, as well as the imposition of sanctions for taking legitimate strike action.

Body of principles on the right to strike

As a summary of the preceding sections, there follows a synthesis of the principals and minimum rules of conduct established by the committee on freedom of association as regards the right to strike.

A. Consideration of the right to strike as a fundamental right to be enjoined by workers and their organizations (trade unions, federations and confederations), which is

protected at international level, provided that the right is exercised in a peaceful manner.

B. General recognition of the right to strike for workers in the public and private sectors, with the sole possible exceptions being members of the armed and police forces, public servants who exercise authority in the name of the state and workers employed in essential services in the strict sense of the term (the interruption of which could endanger the life, safety or health of the whole or part of the population), or in situations of acute national crisis.

C. The principals of freedom of association do not cover strikes of a purely political nature, although they do not cover those which seek a solution to major issues in economic and social policy.

D. A blanket ban on sympathy strikes could lead to abuse. Workers should be able to enjoy the right to take such action when the initial strike they are supporting is itself lawful.

E. A minimum safety service may be imposed in all cases of strike action when such minimum services are intended to ensure the safety of persons, the prevention of accidents and the safety of machinery and equipment.

F. A minimum operational service may be established (in the undertaking or institution in question) in the case of strikes in public utility services and in public services of fundamental importance; employers' and workers' organizations and the public authorities should be able to participate in determining this minimum service.

G. The obligation to give prior notice, the obligation to engage in conciliation, have recourse to voluntary arbitration, comply with a given quorum and obtain the agreement of a given majority where this does not cause the strike to become very difficult or even impossible in practice and the secret ballot method to decide strike action are all acceptable conditions for the exercise of the right to strike.

H. Restrictions on picketing should be confined to cases in which such action ceases to be peaceful, and picketing should not interfere with the freedom of non-strikers.

I. Requisitioning of the workers of an undertaking or institution in the event of the strike is admissible only in the case of a strike in an essential service and is

acceptable only in strikes in an essential service or under circumstances of utmost gravity and in situations of acute national crisis.

J. The hiring of workers to replace strikers seriously impairs the right to strike and is acceptable only in strikes in an essential service or in situations of acute national crisis

K. Legal provisions regarding wage deductions for days of strike give rise to no obligation

L. Appropriate protection should be afforded to trade union officials and workers against dismissal and other detrimental acts at work for organizing or participating in a legitimate strike, in particular through prompt, efficient and impartial procedures, accompanied by sufficiently dissuasive remedies and sanctions.

M. The protection of freedom of association does not cover abuses in the exercise of the right to strike involving failure to comply with reasonable requirements regarding lawfulness, or consisting of acts of a criminal nature; any sanctions imposed in the event of abuse should not be disproportionate to the seriousness of the violations.

Final observations

It is interesting to note that, with a few exceptions, until the late nineteenth century, strikes were generally considered to be an unlawful activity of a criminal nature, and that they were unlawful in many countries until beyond the mid-twentieth century. It is therefore remarkable that the right to strike subsequently became a fundamental right recognized by the large majority of countries, was embodied in the united nations international covenant on economic, social and cultural rights, 1996, and has been protected by the ILO supervisory bodies (principally the committee on freedom of association since 1952 and the committee of experts on the application of conventions and recommendations since 1959). The decisions of these supervisory bodies have given rise to a body of principals on the right to strike broadly shared by the international community and based on the general principals of freedom of association embodied in the ILO constitution and in the core conventions on this subject.

As to the practice followed by the different member states, though measures restricting the right to strike are relatively frequent, the principal of the right to strike as a means of action for trade union organizations is almost universally recognized. So that though, on 20 September 1998, the number of countries having ratified convention No. 87 stood at 122, observations made on this question by the committee of experts in its 1997 and 1998 reports concerned only 49 of those countries. Moreover, some of the observations referred merely to the means or conditions for the exercise of the right to strike, which do not always amount to very serious restrictions. This shows that the committee of experts considers the legislation governing strikes is satisfactory in a clear majority of the countries which have ratified convention No. 87. The problems most frequently arising in connection with the strike are: the imposition of compulsory arbitration by decision of the authorities or at the initiative of one of the parties; the imposition of penal sanctions for organizing or participating in unlawful strikes; the requirement of an excessively large majority of votes to be able to call a strike; a ban on strikes by public servants who do not exercise authority in the name of the state; the power forcibly to requisition striking workers and in many countries, the ban on strikes in certain non-essential services.

It emerges from this study that the principals regarding the right of strike laid down by the committee on freedom of association and by the committee of experts coincide on partially all essential points, without, however, obliterating their respective approaches. The two bodies are autonomous, each with its own composition, procedure and mandate. The committee on freedom of association is a tripartite body of the ILO's governing body, which examines complaints submitted in regard to breaches of trade union rights, while the committee of experts (composed of independent legal experts) carries out regular monitoring of compliance with ratified conventions.

On the basis of reports submitted by governments, and the observations of the workers' and employers' organizations, the committee of experts submit annual reports and, in response to decisions of the governing body, general surveys of national law and practice regarding matters covered by one or more convention(s). they hold different mandates:the committee of experts is required principally to give its opinion regarding

compliance with ILO standards (including those regarding freedom of association) under national legislations, and the committee on freedom of association to give its opinion regarding alleged breaches of trade union rights in practice, presented by workers' and employers' organizations. Thus, the body of principles of the supervisory bodies regarding the right to strike is product of principals of the practical requirements of their respective briefs in a world characterized by widely differing and not always satisfactory national legislations.

The fact that the principals of the committee on freedom of association and of the committee of experts on the subject of strikes so largely coincide may be accounted for by their concern to avoid discrepancies on basic points and also by the nature esteem and good working relationship between the two bodies. Firstly, they are cognizant of their respective reports: the committee of experts frequently refers in its observations to one or other aspect of freedom of association in practice of a particular country mentioned in the reports of the committee on freedom of association; the latter consults the committee of experts on legislative aspects of the cases it is examining, or employs the principals laid down by the committee of experts. Secondly, either body may refer in its reports to the views of the other, in connection with matters already dealt with by the other. Thirdly, the committee on freedom of association has opted on occasion to adapt its principals regarding particular issues (for example, the definition of essential services or the identification of public servants who may be excluded from the right to strike) to bring them into line with those established in the general surveys conducted by the committee of experts. Finally, Professor Roberto Ago, judge at the international court of justice and chairman of the committee of experts from 1961 to February 1995, was also a member of the committee of experts from March 1979 to February 1995.

Such an approach provides a dual input into thinking on these issues and ensures a particular appropriate international approach to the right to strike, which brings together the purely technical approach of the committee of experts with the tripartite technical approach of the committee on freedom of association (that is, that of a specialized body whose members act in their individual capacity and are not subject to instructions,

although without ignoring general interests and points of view deriving from their membership of a group, that is, the governing delegates, Employers' group or workers' group of the ILO governing body). Thus, as a result of the relationship between these bodies, a broad and realistic consensus has emerged regarding fundamental aspects of the right to strike. This is particular important given that these bodies are the standard-bearers of the prestige, authority and credibility of an international and universal organizations.

In terms of content, the principals and rules off conduct drawn up by the two supervisory bodies regarding the right to strike include, primarily, its peaceful exercise, the admissibility of particular standards regarding the objectives and lawfulness of strike action, the identification of the categories of workers who should enjoy this right, the rejection of any form of discrimination in reprisal for having organized or participated in legitimate strikes (the chief principals and rules of conduct were given in the preceding section). These are provided within a framework which simultaneously takes account of the diversity of national legal systems, seeks to establish sufficient levels of protection for the exercise of the right to strike and to balance the rights of trade unions, employers, users of essential services and of public utility services, and the state.

Today the right to strike is essential to a democratic society, so one might justifiably wonder why there is no ILO convention or recommendation on the subject. There are a number of reasons for this. ILO constituents' differing views on this question, together with the difficulties raised by the regulation of so complex of a subject and the fear that the result may prove unsatisfactory have meant that its supporters have not been able to rally a sufficient majority to place discussion of an international instrument specifically governing the right to strike on the agenda of the international labour conference. Moreover, there is a close link between the absence of an ILO instrument in this respect and the advantage afforded by the current, flexible system which, without imposing the formal obligations that arises from ratification, allows the committee on freedom of association and the committee of experts, through their body of principals, to establish

valuable points of reference to the international community. Thus, both ILO supervisory bodies exercise a considerable, positive influence in the medium and long terms on the way in which national legislation evolves regarding the right to strike and, in the shorter term, on guiding or correcting national decisions on specific cases concerning exercise of this right which are submitted to them.

Finally, the full importance of the ILO principals on the right to strike as enunciated by the supervisory bodies emerges when on realizes the extent to which substantial restrictions on fundamental trade union rights undermine not only the balance of labour relations and the existence of a counterbalance to the power of the state in the economy, but also reduce expectations of any improvement in conditions of employment and in the standard of living within civil society. For all these reasons, therefore, one may legitimately point to invaluable contribution made by the committee on freedom of association and by the committee of experts to the development of contemporary international law.

Problem for discussion

The FDRE Constitution provides that " …employees have the right to express grievances including the right to strike"(Art.42(1)(b)). The Labour Proclamation comes in and stipulates to the effect that "employees of essential service enterprises are not allowed to call on strikes" (Arts.136 (2) &157(3) LP). Is it not justifiable to hold that the Labour Proclamation is unconstitutional, in this respect, as it denies what the constitution allows? Why/ Why not?

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7. ELPA-Vs- Anley Neway, File No.16648

Annex-I

FEDERAL NEGARIT GAZETA

OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA

PROCLAMATION NO. 466/2005.

A PROCLAMATION TO AMEND THE LABOUR PROCLAMATION

I

WHEREAS, it has become necessary to amend the Labour Proclamation No.3 77/2003;

NOW, THEREFORE, in accordance with Article 55 (I) of the Constitution of the Federal Democratic Republic of Ethiopia, it is hereby proclaimed as follows:

1. Short Title

This Proclamation may be cited as the "Labour (Amendment) Proclamation No. 466/2005."

2. Amendment

The Labour Proclamation No. 377/2003 is hereby amended as follows:

Sub-Articles (I) and (2) of Article 144 of the Proclamation are deleted and replaced by the following new Sub-Articles Article (I)and (2):

1) One or more permanent labour relations boards (hereinafter referred to as "permanent board') may be established in regional states. Provided however, that a separate board shall be established in Addis Ababa to hear and decide cases involving undertakings owned by the Federal Government.

2) Adhoc labour relations board (hereinafter referred to as 'adhoc board') may be established to hear and decide disputes that may arise on matters specified in Sub-Article 1(a) of Article 142 and in undertakings referred to in Article 136(2) of this Proclamations. Provided however, that a separate adhoc board shall be established ins Ababa to hear and decide disputes in respect of matters arising in undertakings owned by the Federal Government."

2/ The following new Sub-Article (4) is added under Article 144 of the Proclamation:

"4) Notwithstanding Sub-Article (3) of this Article adhoc and permanent boards established under

Sub-Article (I) and (2) of this Article to hear and decide disputes in respect of matters involving
undertakings owned by the Federal Government shall be accountable to the Ministry of Labour
and Social Affairs.'

3. Effective Date

The Proclamation shall enter into force on the 30thday of June, 2005.

Done at Addis Ababa, the 30th day of June, 2005.

GIRMA WOLDEGIORGIS
PRESIDENT OF THE FEDERAL
DEMOCRATIC REPUBLIC OF ETHIOPIA

Annex-II

FEDERAL NEGARIT GAZETA

OF THE FEDERAL DEMOCRATIC REPUBUC OF ETHIOPIA

PROCLAMATION NO. 494/2006.

A PROCLAMATION TO PROVIDE FOR THE AMENDMENT OF THE LABOUR PROCLAMATION

WHEREAS, it has become necessary to amend the Labour Proclamation No. 377/2003;

NOW, THEREFORE, in accordance with Sub Articles(1) and (3) of Article55 of the Constitution of the Federal Democratic Republic of Ethiopia, it is hereby proclaimed as follows;

1. Short Title

This Proclamation may be cited as the "Labour (Amendment) Proclamation No.494/2006."

2. Amendment

The Labour Proclamation No. 377/2003 is hereby amended as follows: I

1) The provision of (c) of Sub-Article 2 of Article 3 is deleted and replaced by new provision (c) of Sub-Article 2 of Article 3

"(c) managerial employee who is vested with powers to lay down and execute

management policies by law or by delegation of the employer depending on the type of activities of the undertaking with or without the aforementioned powers an individual who is vested with the power to hire, transfer, suspend, lay off, assign or take disciplinary measures against employees and include legal service head who recommend measures to be taken by the employer regarding managerial issues by using his independent judgment in the interest of the employer;"

2) The following new provisions (g), (h) and (i) are added to Sub-Article (1) of Article 39:

g) where he has no entitlement to a provident fund or pension right and his-contract of employment is terminated upon attainment of retirement age stipulated in the pension law;

h) where he has given service to the employer for a minimum of five years and his contract

of employment is terminated because of his sickness or death or his contract of employment is terminated on his own initiative provided that he has no contractual obligation, relating to training, to serve more with the employer.

i) where his contract of employment is terminated on his own initiative because of HIV *I*AIDS.

3) Sub-Article (6) of Article 130 is deleted and replaced by the following new Sub-Article (6):

"6) parties to a collective agreement shall commence negotiation to amend or replace their collective agreement within 3 months before the expiry date of the validity period of the collective agreement; provided, however, that if the negotiation is not finalized within 3 months from the expiry date of the collective agreement, the provisions of the collective agreement relating to wages and other benefits shall

cease to be effective."

4/ Article 185 is deleted and replaced by the following new Article 185:

185. Common offences

1) An employer, a trade union, a worker or representative of employer which:
a) violates the provisions of tl1is Proclamation or regulations or directives issued hereunder relating to the safety of workers and commit an act which expose the life or health of a worker to a serious danger, or does not give special protection to women workers or young workers as provided for in this Proclamation;
b) contravenes the provisions of Article 160 of this Proclamation;
c) does not comply with the order given by a labour inspector in accordance with this Proclamation or the provisions of other laws; or
d) gives intentionally false information or explanations to the competent authorities; .
shall be liable to a fine not exceeding Birrl,200
2/ An employer, a trade union, a worker or representative of employer which contravenes Sub-Article (2) or (4) of Article 130 of this Proclamation shall be liable to a fine not exceeding Birr 10,000

3. Effective Date

This Proclamation shall enter into force on the date of its publication in the Federal Negarit
Gazeta.
Done at Addis Ababa, this 29th day of June 2006
GIRMA WOLDEGIORGIS
PRESIDENT OF THE FEDERAL
DEMOCRATIC REPUBLIC OF ETHIOPIA

Annex III

FEDERAL NEGARIT GAZETTA
OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA
CONTENTS
Proclamation No. 345/2003
PUBLIC SERVANTS' PENSIONS PROCLAMATION

WHEREAS, it is found necessary to strengthen, to the extent circumstances allow, the public servants' pension scheme organized under existing laws; and to amend and consolidate
the pension legislations;

NOW, THEREFORE, in accordance with Article 55 (1) of the Constitution of the Federal Democratic Republic of Ethiopia, it is hereby proclaimed as follows;

PART ONE

General

1. *Short Title*

This Proclamation may be cited as the "Public Servants' Pensions Proclamation No.345/2003."

2. *Definitions*

In this Proclamation, unless the context otherwise requires:

1) "Public Servant" means a person permanently employed in any public office, and includes a government appointee, member of the Defense Force and
. the Police;
2) "Public Office" means an office wholly or partly run by government budget, and includes public enterprises;
3) "Public Organ" means public offices, and includes Councils established at a Federal Government and Regional States levels and City Administration;
4) "Government" includes the Federal Democratic Republic of Ethiopia and the Regional States;
5) "Member of the Defense Force" means a person permanently employed in Defense Force to render military service;
6) "Member of the Police" means a person permanently employed and render service under the Federal or Regional States Police establishment legislations;

7) "Civil Service" means service rendered by public servants other than members of the Defense Forces and the police;

8) "Military Service" means a service rendered by members of the Defense Force;

9) "Police Service" means a service rendered by members of the police;

10) "Enterprise" includes public enterprises and enterprises in which the government's capital share is not less than fifty percent (50%);

11) "Employer" means a public office or public organ which pays salaries to public servants, or any organ which pay salaries for persons whose period of service is counted under this Proclamation;

12) "Salary means monthly salary received by a public servant, for services rendered during regular working hours, without the deduction of any amounts in respect of income tax or any other matter;

13) "Benefit" means retirement pension, invalidity pension, incapacity pension or survivors' pension and includes gratuity and the refundable pension contribution,

14) "Beneficiary" means a public servant or hi survivor who receives benefits or fulfils the conditions for receiving benefits in accordance with this Proclamation;

15) "Survivor" includes persons mentioned under Article34 (3) thereof,

16) "Authority" means Social Security Authority;

17) "Pensions Funds" means public servant's Pension Funds established for the purpose of Pension Funds contributions being collected and effecting benefit payments provided by this Proclamation.

3. Scope of *Application*

Without prejudice to the appropriate provision of the Proclamation 270/2002 that provides pension coverage to foreign nationals of Ethiopian origin, any international and bilateral agreements to which the country is a party, this Proclamation shall be applicable to public servants of Ethiopian nationality.

PART TWO

PENSION FUNDS AND CONTRIBUTIONS

4. Pension Funds

The following Public Servants' Pension Funds are hereby established by this proclamation.

I) Civil Service Fund.

2) Military and Police Service Fund.

5. Civil Service Fund Contributions

The amount of the contribution payable to the Civil Service Fund, based on the salary of the Public Servant shall be:

I) by the employer six percent (6%),

2) By the public servant four percent (4%),

6. Military and Police Fund Service Contributions

The amount of the contribution payable to the Military and Police Service Fund based on the Salary of the member of the Defense Force and the Police shall be:

I) by the employer sixteen percent (16%).

2) by the public servant four percent (4%).

7. Payment of Contributions

1) Each Employer shall deduct the contribution due upon each public servant's salary and shall pay the amount, together with the contribution due from the office as an employer, into the pension fund monthly;

2) Where the contribution due upon a public servant's salary is not deducted, the concerned employer shall be responsible for payment of the same;

3) Any employer who fails to pay the contribution to under Sub Article (l) of this Article, until the last day of each subsequent month, shall pay monthly an amount of 2% on the un paid arrear contributions.

4) The payment of contribution to Pension Funds has priority over any payments of debts.

8. Administration of the Pension Funds

The Authority shall administer the Funds referred to under Article 4 of this Proclamation.

9. ***Utilization of the Pension Funds***

I) Without prejudice to Article 12(1) of the Social Security Authority establishment Proclamation No. 38/1996, the Pension Funds shall be utilized only for effecting benefit payments stipulated in this Proclamation and investment purpose.

2) The Pension Funds shall not be attached in respect of any debt.

PART THREE

Period of Service and Retirement Age

10. ***Commencement of Period of Service***

1) The period of service of a public servant begins with the date of his appointment or assignment as a public servant.

2) The period of service of a public servant working in an enterprise transferred to the government ownership shall beginto count as of the date of such transfer. However, the service of employees of such enterprise which has a pension scheme or a provident fund that can balance due amount of pension contribution shall be counted, provided that the accumulated fund is wholly transferred to the Public Servants' Pension Funds.

I) Period of service of a public servant shall he calculated in complete years, months and days;

2) Periods of service rendered by any public servant in different public offices shall he counted up;

3) Period of service of a member of the Defense Force or a Police temporary rendered in a duty other than his regular service upon a government order shall he treated as military or police service;

4) For any public servant the following shall also he counted as period of service;

(a) the period of service beyond retirement age upon a government decision subsequent to

retirement due to age;

(b) the period of service spent after reinstatement without interruption of payment of salary;

(c) the period of service which was interrupted without interruption of payment of salary;

(d) the period of service spent in any public organ by election with regular salary as People's

Representative on full time basis;

(e) the period of service rendered temporary without interruption in a government office if

subsequently employed permanently in the same office;

(f) The period of Service rendered in a privatized public enterprise having been transferred

along with the enterprise;

(g) The period of service spent upon a government order in international organizations or enterprises where the government capital share is less than fifty per cent (50%).

5) For any public servant the following shall not be counted as period of service;

(a) unless lawfully retained, the service he renders as of the first day of the month following that

in which he attains retirement age;

(b) without prejudice to any international agreement to which Ethiopia is a party. Service rendered in any public office by a public servant of Ethiopian nationality by naturalization, prior to such naturalization.

6) Period of service referred to under Sub-Article 4 (d)to (g) of this Article shall be counted as period of service only where the public servant pays the contribution due from him and the employer on his own or made the employer pay the same based on the salary paid to him prior to the interruption of his service

7) Where a public servant who has received gratuity or to whom reimbursement of pension contribution was made pursuant to this Proclamation is employed or assigned as

a public servant. his former service shall be counted along with the new, provided that the gratuity or the reimbursed ,contribution is paid back with bank interest.

8) On the basis of studies submitted to it by the Authority, the Council of Ministers may decide that period of service spent on hazardous jobs or on jobs involving risk to health and life be counted, as the case may be, upon twice the actual period.

12. *Retirement Age*

1) The retirement age of public servants shall be as follows:

(a) for members of Defense Force at the age which shall be determined by the appropriate

Provisions of Defense Force establishment Proclamation.

(b) for the members of the Police at the age which shall be determined by the appropriate Provisions of Police establishment legislations.

(c) for all other public servants sixty (60) years.

2) On the basis of studies submitted to it by the Authority the Council of Minister may determine

higher retirement age for professional fields which may need special consideration than the provided under Sub-Article (1) of this Article.

3) On the basis of studies submitted to it by the Authority, the Council of Ministers may decide

earlier retirement age than the provided under Sub- Article (1) of this Article in the case of public

servants working on hazardous jobs involving risk to health and life.

PART FOUR

Retirement Pension and Gratuity

13. *Retirement Pension*

1) A public servant who has completed at least ten (10) years of service, and retires upon attaining retirement age, shall receive retirement pension for life.

2) A public servant who has completed at least twenty(20) years of service and separates from the service by voluntary resignation or for any other causes other than those provided in this Proclamation shall receive retirement pension for life upon attaining retirement age.

3) A public servant other than member of the Defense Force who resigns after completing at least twenty five (25) years of service shall receive retirement pension for life beginning with five years prior to retirement age.

4) A member of Defense Force who resigns after completing at least twenty five (25) years of service shall receive retirement pension for life beginning with three (3) years prior to retirement age.

5) Where it is ascertained that a public servant who has separated from service in accordance with Sub Article (2) through (4) of this- Article becomes incapable of fulfilling the medical conditions of service due to failure in health prior to attaining retirement age, he shall receive invalidity pension for life as of the month following such ascertainment; in case he dies, his survivors shall be paid benefits as of the month following such death.

14. *Amount* of *Retirement Pension*

The retirement pension due to any civil servant shall amount to thirty percent (30%) of the average salary for the last three years preceding retirement, increased for each year of service beyond ten (10) years;

1) For a public servant other than member of the Defense Force or Police by one point one two five per cent (1.125%);

2) For a member of the Defense Force or Police by one point five per cent (1.5%).

However; the retirement pension to be paid pursuant to Sub-Article (1) and (2) of this Article shall not exceed seventy percent 70%*).*

15. *Retirement Gratuity*

A public servant who has not completed ten (10) years of service and retires on attaining retirement age shall receive gratuity.

16. *Amount* of *Gratuity*

The gratuity payable in accordance with Articel15 of this Proclamation shall be;

1) For a public servant other than member of the Defense Force or Police the salary of the month

preceding retirement multiplied by the number of years of service;

2) For a member of the Defense Force, or Police the salary of one and one-half month preceding

retirement multiplied by the number of years of service.

PART FIVE

Invalidity Pension and Gratuity

17. *Invalidity Pension*

1) A public servant who has completed at least ten (10) ye;Jrs of service and is retired because he does not fulfill the medical condition of service shall receive invalidity pension for life.

2) If a beneficiary who is receiving invalidity pension engages in any gainful activity and begins getting salary the pension shall be discontinued.

18. *Amount* of *Invalidity Pension*

The invalidity pension payable by this Proclamation shall be calculated as provided under Article 14 thereof,

19. *Invalidity Gratuity*

A public servant who has not completed ten (10) years of service and retires because he does not fulfill the medical condition shall receive invalidity gratuity.

20. *Amount* of *Invalidity Gratuity*

The gratuity payable in accordance with Article 19 of this Proclamation shall be calculated as provided under Article 16 thereof.

21. *Reimbursement* of *Contribution*

A public servant:

1) Who separates from work due to resignation after completing ten (10) years, but prior to completing twenty (20) years of service, or
2) Who separates from work for any other cause other than specified by this Proclamation prior to twenty(20) years of service.
Shall be paid an amount equal to the total four percent (4%) contribution therefore made by him.
3) Who separates from work due to resignation prior to completing ten (10) years service shall be entitled to no benefit.

PART SIX

Employment Injury and the Payment

of *benefit*

"Employment Accident" means any organic injury or functional disorder suddenly sustained by a
public servant during or in connection with the performance of his work, and shall include the
following:
(a) injury sustained by a public servant outside of his regular work, or outside of his regular
working place or hours, while carrying out orders by a competent authority;
(b) injury sustained by a public servant during or outside of working hours while attempting to
save his work place from destruction or imminent danger, though without order by a competent authority;
(C) injury sustained by a public servant while he is proceeding to or from his place of work in a
transport service vehicle provided by the office which is available for the common use of its employees or in a vehicle hired and expressly destined by the office for the same purpose.

(d) any injury sustained by a public servant before or after his work or during any interruption of
work, if he is present in the work place or the premises of the undertaking by re'ason of his
duties in connection with this work,

(e) any injury sustained by a public servant as a result of an action of the employer or a thrid
person during the performance of his work.

"Occupational Disease" means any pathological condition of a public servant which arises, as a consequence of the kind of work he performs or because of the surrounding in which he works, being exposed to the agent that cause the disease for a certain priod prior to the date in which the disease became evident; provided, however, that it does not include endemic or epidemic disease which are prevalent and contracted in the area where the work is done.

"Regular Work" means a work performed by a public servant pursuant to his"'responsibilities or
contract of employment

"Regular Place of Work" means a place where a public servant regularly performs his duties.

23. *Self Inflicted Injury*

The provisions of Article 22 of this Proclamation shall apply only where the public servant has not inflicted the injury upon himself intentionally; any injury resulting from the following acts in particular shall be deemed to be intentionally caused by the public servant.

1) non-obedience of expressed safety instruction of non-observance of the provisions of accident
preventive rules specially issued by the employer

2) reporting to work in a state of intoxication that prevents him from properly regulating his conduct or understanding

24. *Occupational Disease and Extent* of *Incapacity Schedule*

The Authority, in consultation with the appropriate organ, shall by directives issue a schedule which list,

1) The degree of incapacity,

2) Regarding each occupational disease indicating;

(a) the symptoms,

(b) the kind of work or surrounding that gives risk to the disease,

(c) the minimum of exposure & the agent causing the disease.

The schedule shall be revised wherever it may be deemed necessary, be deemed necessary, be deemed necessary,

25. *Presumption*

1) Where a disease listed in the schedule in connection with a work place or with a kind of work is contracted by a public servant in a corresponding situation, it shall be presumed an occupational disease.

2) Where a public servant who had recovered from an occupational disease is reinfected due to continued placement in the occupation corresponding to the disease listed in the schedule, he shall be presumed to have contracted another occupational disease.

3) Notwithstanding the provisions of Article 22 (3) of this Proclamation where a public servant engaged in the eradication of endemic or epidemic disease contracts same, it shall be presumed an occupational disease.

26. *Admissibility of Proof*

Proof may be permitted to the effect that a disease not listed in the schedule issued under Article 24 here in above could be of occupational origin, and that diseases listed in the schedule are manifested in a different symptom than that indicated therein.

27. *Notification* of *Accident*

Where a public servant other than member of the Defense Force sustains occupational injury the employer shall notify in writing the same with in thirty (30) days of the occurrence of such accident to the Authority.

28. *Assessment* of *Employment Injury*

1) The extent of employment injury sustained by a public servant shall be assessed by authorized

medical board in accordance with the schedule to be issued pursuant to Article 24 of this Proclamation

3) When it deems necessary, the Authority can refer the assessment to another medical board for further evaluation,

29. *Incapacity Benefit*

Incapacity pension for life or incapacity gratuity shall be paid as the case may be, for injury sustained from employment.

30. *Incapacity Pension*

1) A public servant who sustains employment injury of not less than ten percent (10%) and separates from work due to absolute incapacitation shall receive an incapacity pension for life.

2) If a beneficiary who is receiving incapacity pension engages in any gainful activity and begins getting salary, the pension shall be discontinued.

31. *Amount of Incapacity Pension*

1) In accordance with this Proclamation a public servant who sustains employment injury shall

receive an incapacity pension for life amounting to forty five percent *(45%)* of his basic monthly salary which he was receiving during the month prior to the

occurrence of the injury.

2) If the incapacity pension mentioned under Sub- Article (1) is less than that or equal to the retirement pension to which the beneficiary is entitled, he shall receive the retirement pension.

32. *Incapacity Gratuity*

A public servant who sustains employment injury of not less than ten percent (10%) without loss of capacity to work shall receive incapacity gratuity in the form of a lump sum. However, no gratuity shall be paid if the incapacity is assessed at less than ten percent (l0%*)*

33. *Amount of Incapacity Gratuity*

The amount of incapacity gratuity payable in accordance with the provisions of Article 32 here in above shall be equal to forty five percent *(45%)* of the basic monthly salary which he was receiving during the month preceding the occurrence of the injury times five years

salary times the amount of percentage of injury sustained.

PART SEVEN

Survivors' Pension and Gratuity

34. *General*

1) If any public servant:-

(a) who is entitled to retirement or invalidity or incapacity pension, or

(b) who has completed at least ten (l0) years or service, but not separated from the service or

(c) who sustained employment injury dies a pension shall he paid to his survivors.

2) If a public servant who has not completed ten (10) years of service dies before he separates from the service, the survivors mentioned in Sub-Article 3 (a) and (b) of this Article shall receive gratuity.

3) The following shall be considered as survivors:

(a) a widow or widower,

(b) children of the deceased who are under eighteen(18) years of age,

(c) parents who were wholly or mainly supported by the deceased.

35. *Widow's or Widower's Pension*

1) The amount of pension payable to a widow or widower shall be fifty per cent (50%) of the pension to which the deceased was or would have been entitled.

2) widow's or widower's pension shall be discontinued from the beginning of the month following

remamage.

36. *Orphan's Pension*

1) The amount of pension payable to each surviving chi Id shall be twenty per cent (20%) of the pension to which the deceased was or would have been entitled.

2) If both parents are dead, the amount of pension payable to each surviving child in accordance with Sub-Article (1) of this Article shall be thirty per cent (30%).

3) If both parents of an orphan who were or would have been entitled to a pension are dead, he shall receive twenty per cent (20%) of each of their pension. Provided, however; that the amount of pension payable in accordance with this Sub-Article shall not be less than the amount payable in accordance with Sub-Article (2) of this Article.

37. *Parent's Pension*

The amount of pension payable to each parent shall be fifteen per cent (15%) of the pension to which the deceased was or would have been entitled. If there are no other survivors the amount shall be twenty percent *(20%)*

38. *Survivors' Gratuity*

The amount of gratuity payable to any survivor shall be the amount of gratuity to which the deceased would have been entitled and shall be calculated in accordance with the percentage specified in Article 35(1) or 36 of this Proclamation.

39. *Limit* of *Survivors' Pension*

1) If the total benefits payable to survivors, in accordance with Article 35 through 38 of this

Proclamation is in excess of hundred percent *(100(,1*) of the benefit to which the deceased was or would have been entitled, each survivor's share shall be proportionately reduced until the total comes down to hundred percent (100%) .

2) Upon reduction in the number of survivors subsequent to adjustment under Sub-Article (I) of this Article, further adjustment of the amount of benefits shall be made.

PART EIGHT

General Provisions Relating to Benefits

40. Minimum amount of pension and pension adjustment on the basis of studies submitted to it by the Authority, the Council of Ministers may adjust pension benefit every five years

41. *Mode and Period* of *Payment* of *Pension*

I) Pension shall be effected monthly.

2) Payment of retirement pension shall begin as of the month following that in which the public servant retires.

3) Payment of invalidity pension shall begin as of the month following that in which the invalidity of the public servant ascertains

4) Payment of incapacity pension shall begin as of the month following that in which the permanent total incapacity sustained by the public servant ascertains

5) Payment of survivors' pension shall begin as of the month following that in which the beneficiary dies.

42. *Mode and Period* of *Payment* of *Gratuity*

1) Any gratuity is effected in lump sum at once.

2) Retirement or invalidity gratuity shall be payable beginning with the first day of the month following that in which the public servant separates from the service.

3) Incapacity gratuity shall be payable beginning the first day of the month following that in which tl1e injury sustained by the public servant ascertains.

43. *Period* of *Limitation*

1) Any claim for payment of arrears of pension shall be barred by limitation after one (l) year.

2) Any claim for payment of gratuity shall be barred by limitation after two (2) years.

3) A claim for reimbursement of pension contribution shall be barred by limitation two years after the date in which the public servant attains retirement age or dies.

4) The period of limitation shall beginto run from the day following that in which the right may be exercised.

5) The period of limitation shall not include the following:-

(a) period lapsed due to a court process started to establish right,

(b) period lapsed due to non fulfillment by the employer its obligation to submit evidentiary

documents on time,

(c) periods necessary for the decision of benefit entitlement by the Authority.

44. *Entitlement* of *Benefits not Transferable*

The right to receive benefits shall not be pledged or cannot be transferred by inheritance or any other means.

45. *Attachment* of *Benefits*

Benefits payable in accordance with this Proclamation shall not be attached for any debts unless ordered by a court in respect of:

1) Public fines, public fees or taxes; or

2) Fulfillment of the obligation to supply maintenance in accordance with relevant Civil Code provisions.

PART NINE

Miscellaneous Provisions

46. Relationship between Entitlements

1) If a public servant who receives retirement pension re-enters the public service and receives salary, the pension shall be discontinued.

2) If a pensioner is re-employed permanently in a public office, the service shall be added and counted with previous service for the purpose of benefit entitlement. However, if the new benefit is less than the former benefit the pensioner shall have the right to get the previous benefit;

3) If a beneficiary is entitled to more than one benefit, the amount of benefit to be paid shall be decided by the authority;

4) Without prejudice to Article 10(2) of this Proclamation, a retired employee of nationalized enterprise who is receiving monthly benefit on the date of such nationalization shall continue to get the amount of pension benefit adjusted to the appropriate provision of this Proclamation.

47. *Obligation* of *Employers*

1) Any employer shall collect, compile and submit to the Authority evidentiary documents relating to employees which are necessary for the implementation of this Proclamation in accordance with the form and within the time decided by the Authority;

2) for the purpose of implementing this Proclamation, any government office, mass or private organization or individual shall furnish information or written evidence or appear and testify or give his opinion when so requested by the Authority.

48. *Decision* of *the Authority*

1) The fulfillment of conditions for entitlement to any kind of benefit payable in accordance with this Proclamation and the amount of the benefit shall be decided by the Authority;

2) The decision of the Authority regarding those specified in Sub-Article (1) of this Article shall be based on its own record, evidentiary document submitted to it in accordance with Article 47 of this Proclamation and, as the case may be, on additional evidences produced by the beneficiary;

3) When difference occurs between the records of the Authority and documents provided by other organs, the evidentiary document to be accepted shall be decided by the Authority

49. *Review* of *Decisions*

1) The Authority may review its previous decision upon request by an aggrieved beneficiary or on its own initiative;

2) Where upon review the Authority finds that there is reasonable ground for cancellation or deduction of benefits, it may suspend payment to the extent the benefit is to be cancelled or deducted;

3) Notwithstanding the provisions of Article 45 of this Proclamation, upon decision of deduction of any benefit payment contrary to this Proclamation the Authority shall deduct the amount paid thereof illegally from the benefit of the pensioner and transfer it to the funds.

50. Appeal

Any public servant or survivor, who is aggrieved by the decision of the Authority made pursuant to Article 48 or49 of this Proclamation, shall have a right to lodge an appeal to the Social Security Appeal Tribunal established in accordance with Article 11 of the Social Security Authority Establishment Proclamation No. 38/1996.

51. *Tax Exemption*

Not tax shall be payable on benefits received, pension contribution collected and profit from investment of pension fund in accordance with this Proclamation.

52. *Transitory Provisions*

I) Previous laws and directives shall remain applicable to legal situations created before the coming into force of this Proclamation.

2) Notwithstanding the provisions of Sub-Article (1) of this Article. a public servant lawfully retained in service beyond retirement age before the coming into force of this Proclamation shall have a right to into force of this Proclamation shall have a right to remain in service until he attains the retirement age set forth in this Proclamation;

3/ Until the Authority issues the schedule determining the degree of incapacity specified in Article 24 the practices followed by the medical hoards shall remain applicable.

53. *Power to Issue Regulations and Directives*

1) The Council of Ministers may issue regulations necessary for the implementation of this
Proclamation;
2) The Authority may issue directives necessary for the implementation of this Proclamation and regulations issued pursuant to Sub-Article (1) of this Article.

54. Penalty

Who ever violates the provisions of this Proclamation or regulations and directives issued pursuant to this Proclamation shall be punished in accordance with the appropriate Penal Law provisions.

55. *Repealed and Inapplicable Laws*

1) The following are hereby repealed:-
(a) Public Servants' Pensions Proclamation No. 209/1963 (as amended);
(b) Public Servants' Pension Contribution Proclamation No. 199/1963 (as amended);
(c) Employees of Government Owned Undertakings Pension Proclamation No. 49/1975;
2) No law and directives shall in so far as it is inconsistent with this Proclamation, have force and effect in respect of matters provided for in this Proclamation.

56. *Effective Date*

This Proclamation shall enter into force as of 8thday of June. 2003.
Done at Addis Ababa, this 8"' *day of June, 2003.*
GIRMA WOLDE GIORGIS
PRESIDENT OF THE FEDERAL
DEMOCRA TIC REPUBLIC OF ETHIOPIA

Annex-IV

C87 Freedom of Association and Protection of the Right to Organise Convention, 1948

Convention concerning Freedom of Association and Protection of the Right to Organise

(Note: Date of coming into force: 04:07:1950.)

Convention:C087

Place:(San Francisco)

Session of the Conference:31

Date of adoption:09:07:1948

Subject classification: Freedom of Association

Subject classification: Collective Bargaining and Agreements

Status: Up-to-date instrument This instrument is one of the fundamental conventions.

The General Conference of the International Labour Organisation,

Having been convened at San Francisco by the Governing Body of the International Labour Office, and having met in its Thirty-first Session on 17 June 1948;

Having decided to adopt, in the form of a Convention, certain proposals concerning freedom of association and protection of the right to organise, which is the seventh item on the agenda of the session;

Considering that the Preamble to the Constitution of the International Labour Organisation declares "recognition of the principle of freedom of association" to be a means of improving conditions of labour and of establishing peace;

Considering that the Declaration of Philadelphia reaffirms that "freedom of expression and of association are essential to sustained progress";

Considering that the International Labour Conference, at its Thirtieth Session, unanimously adopted the principles which should form the basis for international regulation;

Considering that the General Assembly of the United Nations, at its Second Session, endorsed these principles and requested the International Labour Organisation to continue every effort in order that it may be possible to adopt one or several international Conventions;

adopts this ninth day of July of the year one thousand nine hundred and forty-eight the following Convention, which may be cited as the Freedom of Association and Protection of the Right to Organise Convention, 1948:

PART I. FREEDOM OF ASSOCIATION

Article 1

Each Member of the International Labour Organisation for which this Convention is in force undertakes to give effect to the following provisions.

Article 2

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

Article 3

1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Article 4

Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.

Article 5

Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.

Article 6

The provisions of Articles 2, 3 and 4 hereof apply to federations and confederations of workers' and employers' organisations.

Article 7

The acquisition of legal personality by workers' and employers' organisations, federations and confederations shall not be made subject to conditions of such a character as to restrict the application of the provisions of Articles 2, 3 and 4 hereof.

Article 8

1. In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land.

2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.

Article 9

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

2. In accordance with the principle set forth in paragraph 8 of Article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

Article 10

In this Convention the term *organisation* means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.

PART II. PROTECTION OF THE RIGHT TO ORGANISE

Article 11

Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.

PART III. MISCELLANEOUS PROVISIONS

Article 12

1.In respect of the territories referred to in Article 35 of the Constitution of the International Labour Organisation as amended by the Constitution of the International Labour Organisation Instrument of Amendment 1946, other than the territories referred to in paragraphs 4 and 5 of the said article as so amended, each Member of the Organisation which ratifies this Convention shall communicate to the Director-General of the International Labour Office with or as soon as possible after its ratification a declaration stating:

a) the territories in respect of which it undertakes that the provisions of the Convention shall be applied without modification;

b) the territories in respect of which it undertakes that the provisions of the Convention shall be applied subject to modifications, together with details of the said modifications;

c) the territories in respect of which the Convention is inapplicable and in such cases the grounds on which it is inapplicable;

d) the territories in respect of which it reserves its decision.

2. The undertakings referred to in subparagraphs (a) and (b) of paragraph 1 of this Article shall be deemed to be an integral part of the ratification and shall have the force of ratification.

3. Any Member may at any time by a subsequent declaration cancel in whole or in part any reservations made in its original declaration in virtue of subparagraphs (b), (c) or (d) of paragraph 1 of this Article.

4. Any Member may, at any time at which the Convention is subject to denunciation in accordance with the provisions of Article 16, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of such territories as it may specify.

Article 13

1. Where the subject-matter of this Convention is within the self-governing powers of any non-metropolitan territory, the Member responsible for the international relations of that territory may, in agreement with the government of the territory, communicate to the Director-General of the International Labour Office a declaration accepting on behalf of the territory the obligations of this Convention.

2. A declaration accepting the obligations of this Convention may be communicated to the Director-General of the International Labour Office:

a) by two or more Members of the Organisation in respect of any territory which is under their joint authority; or

b) by any international authority responsible for the administration of any territory, in virtue of the Charter of the United Nations or otherwise, in respect of any such territory.

3. Declarations communicated to the Director-General of the International Labour Office in accordance with the preceding paragraphs of this Article shall indicate whether the

provisions of the Convention will be applied in the territory concerned without modification or subject to modifications; when the declaration indicates that the provisions of the Convention will be applied subject to modifications it shall give details of the said modifications.

4. The Member, Members or international authority concerned may at any time by a subsequent declaration renounce in whole or in part the right to have recourse to any modification indicated in any former declaration.

5. The Member, Members or international authority concerned may, at any time at which this Convention is subject to denunciation in accordance with the provisions of Article 16, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of the application of the Convention.

PART IV. FINAL PROVISIONS

Article 14

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 15

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.

2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratifications has been registered.

Article 16

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph,

exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 17

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications, declarations and denunciations communicated to him by the Members of the Organisation.

2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 18

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications, declarations and acts of denunciation registered by him in accordance with the provisions of the preceding articles.

Article 19

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 20

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides:

a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 16 above, if and when the new revising Convention shall have come into force;

b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 21

The English and French versions of the text of this Convention are equally authoritative.

Annex-V

C98 Right to Organise and Collective Bargaining Convention, 1949

Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively Convention:C098

Status: Up-to-date instrument This instrument is one of the fundamental conventions.

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Thirty-second Session on 8 June 1949, and

Having decided upon the adoption of certain proposals concerning the application of the principles of the right to organise and to bargain collectively, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention,

adopts this first day of July of the year one thousand nine hundred and forty-nine the following Convention, which may be cited as the Right to Organise and Collective Bargaining Convention, 1949:

Article 1

1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.

2. Such protection shall apply more particularly in respect of acts calculated to--

(a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;

(b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

Article 2

1. Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.

2. In particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article.

Article 3

Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in the preceding Articles.

Article 4

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Article 5

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

2. In accordance with the principle set forth in paragraph 8 of Article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

Article 6

This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way.

Article 7

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 8

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.

2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 9

1. Declarations communicated to the Director-General of the International Labour Office in accordance with paragraph 2 of Article 35 of the Constitution of the International Labour Organisation shall indicate --

a) the territories in respect of which the Member concerned undertakes that the provisions of the Convention shall be applied without modification;

b) the territories in respect of which it undertakes that the provisions of the Convention shall be applied subject to modifications, together with details of the said modifications;

c) the territories in respect of which the Convention is inapplicable and in such cases the grounds on which it is inapplicable;

d) the territories in respect of which it reserves its decision pending further consideration of the position.

2. The undertakings referred to in subparagraphs (a) and (b) of paragraph 1 of this Article shall be deemed to be an integral part of the ratification and shall have the force of ratification.

3. Any Member may at any time by a subsequent declaration cancel in whole or in part any reservation made in its original declaration in virtue of subparagraph (b), (c) or (d) of paragraph 1 of this Article.

4. Any Member may, at any time at which the Convention is subject to denunciation in accordance with the provisions of Article 11, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of such territories as it may specify.

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Article 10

1. Declarations communicated to the Director-General of the International Labour Office in accordance with paragraph 4 or 5 of Article 35 of the Constitution of the International Labour Organisation shall indicate whether the provisions of the Convention will be applied in the territory concerned without modification or subject to modifications; when the declaration indicates that the provisions of the Convention will be applied subject to modifications, it shall give details of the said modifications.

2. The Member, Members or international authority concerned may at any time by a subsequent declaration renounce in whole or in part the right to have recourse to any modification indicated in any former declaration.

3. The Member, Members or international authority concerned may, at any time at which this Convention is subject to denunciation in accordance with the provisions of Article 11, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of the application of the Convention.

Article 11

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 12

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications, declarations and denunciations communicated to him by the Members of the Organisation.

2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 13

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications, declarations and acts of denunciation registered by him in accordance with the provisions of the preceding articles.

Article 14

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 15

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides,

a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 11 above, if and when the new revising Convention shall have come into force;

b) as from the date when the new revising Convention comes into force, this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 16

The English and French versions of the text of this Convention are equally authoritative.

Annex-VI

C158 Termination of Employment Convention, 1982

Convention concerning Termination of Employment at the Initiative of the Employer Convention:C158

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Sixty-eighth Session on 2 June 1982, and

Noting the existing international standards contained in the Termination of Employment Recommendation, 1963, and

Noting that since the adoption of the Termination of Employment Recommendation, 1963, significant developments have occurred in the law and practice of many member States on the questions covered by that Recommendation, and

Considering that these developments have made it appropriate to adopt new international standards on the subject, particularly having regard to the serious problems in this field resulting from the economic difficulties and technological changes experienced in recent years in many countries,

Having decided upon the adoption of certain proposals with regard to termination of employment at the initiative of the employer, which is the fifth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention;

adopts this twenty-second day of June of the year one thousand nine hundred and eighty-two the following Convention, which may be cited as the Termination of Employment Convention, 1982:

PART I. METHODS OF IMPLEMENTATION, SCOPE AND DEFINITIONS

Article 1

The provisions of this Convention shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or court decisions or in such other manner as may be consistent with national practice, be given effect by laws or regulations.

Article 2

1. This Convention applies to all branches of economic activity and to all employed persons.

2. A Member may exclude the following categories of employed persons from all or some of the provisions of this Convention:

(a) workers engaged under a contract of employment for a specified period of time or a specified task;

(b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;

(c) workers engaged on a casual basis for a short period.

3. Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention.

4. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention.

5. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them.

6. Each Member which ratifies this Convention shall list in the first report on the application of the Convention submitted under Article 22 of the Constitution of the International Labour Organisation any categories which may have been excluded in pursuance of paragraphs 4 and 5 of this Article, giving the reasons for such exclusion, and shall state in subsequent reports the position of its law and practice regarding the

categories excluded, and the extent to which effect has been given or is proposed to be given to the Convention in respect of such categories.

Article 3

For the purpose of this Convention the terms *termination* and *termination of employment* mean termination of employment at the initiative of the employer.

PART II. STANDARDS OF GENERAL APPLICATION

DIVISION A. JUSTIFICATION FOR TERMINATION

Article 4

The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

Article 5

The following, inter alia, shall not constitute valid reasons for termination:

(a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;

(b) seeking office as, or acting or having acted in the capacity of, a workers' representative;

(c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;

(d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;

(e) absence from work during maternity leave.

Article 6

1. Temporary absence from work because of illness or injury shall not constitute a valid reason for termination.

2. The definition of what constitutes temporary absence from work, the extent to which medical certification shall be required and possible limitations to the application of paragraph 1 of this Article shall be determined in accordance with the methods of implementation referred to in Article 1 of this Convention.

DIVISION B. PROCEDURE PRIOR TO OR AT THE TIME OF TERMINATION

Article 7

The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.

DIVISION C. PROCEDURE OF APPEAL AGAINST TERMINATION

Article 8

1. A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.

2. Where termination has been authorised by a competent authority the application of paragraph 1 of this Article may be varied according to national law and practice.

3. A worker may be deemed to have waived his right to appeal against the termination of his employment if he has not exercised that right within a reasonable period of time after termination.

Article 9

1. The bodies referred to in Article 8 of this Convention shall be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified.

2. In order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation referred to in Article 1 of this Convention shall provide for one or the other or both of the following possibilities:

(a) the burden of proving the existence of a valid reason for the termination as defined in Article 4 of this Convention shall rest on the employer;

(b) the bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reason for the termination having regard to the evidence provided by the parties and according to procedures provided for by national law and practice.

3. In cases of termination stated to be for reasons based on the operational requirements of the undertaking, establishment or service, the bodies referred to in Article 8 of this Convention shall be empowered to determine whether the termination was indeed for

these reasons, but the extent to which they shall also be empowered to decide whether these reasons are sufficient to justify that termination shall be determined by the methods of implementation referred to in Article 1 of this Convention.

Article 10

If the bodies referred to in Article 8 of this Convention find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate.

DIVISION D. PERIOD OF NOTICE

Article 11

A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period.

DIVISION E. SEVERANCE ALLOWANCE AND OTHER INCOME PROTECTION

Article 12

1. A worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to-

(a) a severance allowance or other separation benefits, the amount of which shall be based inter alia on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions; or

(b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or

(c) a combination of such allowance and benefits.

2. A worker who does not fulfill the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in paragraph 1, subparagraph (a), of this Article solely because he is not receiving an unemployment benefit under paragraph 1, subparagraph (b).

3. Provision may be made by the methods of implementation referred to in Article 1 of this Convention for loss of entitlement to the allowance or benefits referred to in paragraph 1, subparagraph (a), of this Article in the event of termination for serious misconduct.

PART III. SUPPLEMENTARY PROVISIONS CONCERNING TERMINATIONS OF EMPLOYMENT FOR ECONOMIC, TECHNOLOGICAL, STRUCTURAL OR SIMILAR REASONS

DIVISION A. CONSULTATION OF WORKERS' REPRESENTATIVES

Article 13

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:

(a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;

(b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.

2. The applicability of paragraph 1 of this Article may be limited by the methods of implementation referred to in Article 1 of this Convention to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

3. For the purposes of this Article the term *the workers' representatives concerned* means the workers' representatives recognised as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971.

DIVISION B. NOTIFICATION TO THE COMPETENT AUTHORITY

Article 14

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, he shall notify, in accordance with national law and practice, the competent authority thereof as early as possible, giving relevant

information, including a written statement of the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out.

2. National laws or regulations may limit the applicability of paragraph 1 of this Article to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

3. The employer shall notify the competent authority of the terminations referred to in paragraph 1 of this Article a minimum period of time before carrying out the terminations, such period to be specified by national laws or regulations.

PART IV. FINAL PROVISIONS

Article 15

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 16

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.

2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 17

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

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Article 18

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.

2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 19

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

Article 20

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 21

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides-

(a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 17 above, if and when the new revising Convention shall have come into force;

(b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

----------End of Text----------